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No. ____

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SUPREME COURT U.S.
POLICE DEPARTMENT

03-8871

In The
Supreme Court of the United States

JON B. CUTTER; J. LEE HAMPTON,
Petitioners,

v.

REGINALD WILKINSON, et al.,
Respondents.

Supreme Court, U.S.
FILED
APR 19 2004
OFFICE OF THE CLERK

JOHN MILLER; DARRYL BLANKENSHIP,
Petitioners,

v.

REGINALD WILKINSON, et al.,
Respondents.

JOHN W. GERHARDT,
Petitioner,

v.

ALAN LAZAROFF, WARDEN, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioners ask leave to file their Petition for a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioners have previously been granted leave to proceed *in forma pauperis* in the United States District Court for the Southern District of Ohio. In addition, the counsel who represent them in this Court have been appointed in the District Court pursuant to 28 U.S. 1915(e)(1).

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No. 03-9877

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On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress violated the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 through § 2000cc-5, which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control.

PARTIES TO THE CONSOLIDATED PROCEEDINGS

The Petitioners are inmates of the Ohio Department of Rehabilitation and Correction. They are Jon Cutter, Lee Hampton, John W. Gerhardt, John Miller, and Darryl Blankenship. John Miller and Darryl Blankenship bring this action individually and on behalf of all other members of the Asatru Religion who are similarly situated.

The Respondents are Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Correction, Alan Lazroff, Warden of the Ohio Department of Rehabilitation and Correction and other named officials of the Ohio Department of Rehabilitation and Correction.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner inmates, who have brought suit against officials of the Ohio Department of Rehabilitation and Correction, respectfully request that this Court grant their Petition for Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals holding that the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-1, violates the Establishment Clause of the First Amendment.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rehearing denied and rehearing en banc denied*, (March 3, 2004). It is reproduced in the Appendix at App. A. The opinion of the District Court and the report and recommendation of the Magistrate Judge are combined in *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827 (S.D.Ohio 2002), which is reproduced in the Appendix at App. B.

JURISDICTION

On February 26, 2002, the District Court denied Respondents' partial motion to dismiss, ruling that the Religious Land Use and Institutionalized Persons Act was constitutional on its face. On August 4, 2003, the District Court certified its ruling for immediate appeal. The Court of Appeals granted leave to appeal on September 23, 2003. The Court of Appeals entered its judgment holding that RLUIPA violates the Establishment Clause on November 7, 2003. A petition for rehearing and rehearing en

banc was denied on March 3, 2004. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE IN THIS CASE

1. The Establishment Clause of the First Amendment provides that: "Congress shall make no law respecting an establishment of religion. . . ."

2. The provisions of the Religious Land Use and Institutionalized Persons Act that are relevant to this petition are in 42 U.S.C. § 2000cc-1:

> (a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution as defined in section 2 of the Civil Rights of Institutionalized Persons Act, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application. This section applies in any case in which –
>
> > (1) the substantial burden is imposed in a program or activity that receives federal financial assistance; or
> > (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian Tribes.

STATEMENT OF THE CASE

Petitioners seek review of the ruling of the Sixth Circuit Court of Appeals invalidating the provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. The specific language of § 2000cc-1 that the Sixth Circuit declared unconstitutional provides that "[n]o government shall impose a substantial burden on

the religious exercise of a person residing in or confined to an institution" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that" interest.[1]

Petitioners seek review of the Sixth Circuit's ruling because it is in conflict with the rulings of three other circuits that have held RLUIPA does not violate the Establishment Clause. See *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) cert. petition pending *sub nom. Bass v. Madison*, No. 03-1404 (filed April 6, 2004); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); and *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), *cert. denied* 124 S.Ct. 66 (2003). It is also in conflict with the authority of Congress and other legislative bodies to accommodate religion by lifting needless burdens on religious exercise imposed by state and federal officials. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

The petition arises out of three separate cases brought by inmates of the Ohio Department of Rehabilitation and Corrections (ODRC) alleging that ODRC officials are imposing burdens on their religious exercise that would violate RLUIPA and would not be imposed if Petitioners were members of mainstream religions. Petitioner Lee Hampton is a member of the Wicca religion which "is polytheistic, finding its pantheon in various European pre-Christian nature religions."[2] Petitioners John Miller and Daryl Blankenship are representatives of the class comprised of inmate members of the Asatru

[1]RLUIPA also contains provisions governing burdens imposed on religious exercise by land use regulations. Those provisions are not at issue in this case.

[2]See Encyclopedia of American Religions, 6th edition, Michigan, 1999, p. 167.

religion, a polytheistic religion that espouses the existence of an "underlying, all-pervading divine energy which is generally hidden from us and which is beyond our immediate understanding."[3] Petitioner Jon Cutter, a former ODRC inmate, is a member of the Satanist religion which formed as a protest against Judeo-Christian spiritual hegemony..[4] John Gerhardt, a former ODRC inmate, is an ordained, licensed Ohio minister in the Church of Jesus Christ Christian, also known as the Christian Identity Church.[5] The Respondents are ODRC officials. In the District Court, Respondents conceded that the Petitioners' religions are *bona fide* and that Petitioners genuinely hold their religious beliefs. *Gerhardt, supra*, 227 F.Supp.2d at 833.

All of the Petitioners make the common claim that they are arbitrarily and discriminatorily being denied access to religious literature by the Respondents. Petitioners Miller and Blankenship also allege that they are being denied access to religious medallions and religious ceremonial items substantially identical to those that inmate members of mainstream religions are allowed to have. Petitioners Miller, Blankenship, and Gerhardt further allege that they are denied opportunities for group worship that are granted to adherents of mainstream religions. In addition, the record contains evidence indicative of hostility of Ohio corrections officials toward

[3]*See* "Frequently Asked Questions about Asatru," available at http://www.runestone.org/faq.html last viewed on April 8, 2004.

[4]Merriam-Webster's Encyclopedia of World Religions, Springfield, Mass., 1999, p. 971. Mr. Cutter is no longer incarcerated at ODRC.

[5]Plaintiff-Appellees' brief filed in the Sixth Circuit, p. 7.

accommodation of religious exercise of non-mainstream religions in general. *See, infra*, p. 14.

Each of the Petitioners' cases was filed prior to the effective date of RLUIPA and relied heavily on the claims that the burdens imposed on their religious exercise violated the Free Exercise Clause and the Equal Protection Clause. Following September 22, 2000, RLUIPA's effective date, the complaint in each of Petitioners' cases was amended to include a claim for relief based on the violation of RLUIPA. Pursuant to an agreement between the parties, the cases were consolidated before a single district judge for the sole purpose of deciding Respondents' partial motion to dismiss which argued, among other things, that RLUIPA was unconstitutional because it violated the Establishment Clause, exceeded Congress' spending authority, and exceeded its power to legislate pursuant to the Commerce Clause. Because the Respondents challenged the constitutionality of a statute enacted by Congress, the Attorney General of the United States was informed of the proceedings and intervened as a plaintiff for the sole purpose of the defending the statute.

The Respondents' challenge to RLUIPA's constitutionality was initially considered by Magistrate Judge Terence P. Kemp, who filed a Report and Recommendation on August 27, 2001, concluding that RLUIPA was constitutional because it was within Congress' spending power and did not violate the Establishment Clause. (Appendix B). On February 25, 2002, District Judge Edmund A. Sargus, Jr. issued an opinion adopting the Magistrate Judge's Report and Recommendation and

upholding the constitutionality of RLUIPA. (Appendix B). The District Court's decision was certified for appeal on August 4, 2003, and the Sixth Circuit granted leave for the parties to proceed with an interlocutory appeal on September 23, 2003.

On November 7, 2003, after considering briefs and argument, the Sixth Circuit held that RLUIPA was unconstitutional because it violated the Establishment Clause. It subsequently denied petitions for rehearing en banc filed by the Petitioners and by the United States.

REASONS FOR THE GRANTING OF THE PETITION

A. The Decision in the Court Below Creates a Split Between the Circuits

The Sixth Circuit's decision creates a direct conflict with the decisions of three other circuits upholding the constitutionality of RLUIPA and is in square conflict with applicable precedents of this Court. Prior to the Sixth Circuit's ruling, *Mayweathers v. Newland*, 314 F.3d 601 (9th Cir. 2002) upheld RLUIPA's constitutionality under Congress' spending power and the Establishment Clause in a case brought by a Muslim inmate alleging that prison rules penalizing attendance of Friday afternoon services violated RLUIPA. *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) upheld RLUIPA against an Establishment Clause challenge in a case brought by Muslim inmate because prison officials enacted rules prohibiting his possession of fragrant Islamic prayer oil to be spread on the body as part of a religious exercise even though other inmates are permitted to possess and use fragrant body oils and lotions for non-religious purposes.

Approximately a month after the Sixth Circuit's decision in this case, *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) upheld the constitutionality of RLUIPA against an Establishment Clause attack in a case brought by a Hebrew Israelite inmate, whose religion honors, but does not worship, Jesus Christ. Prison officials denied the inmate the kosher diet required by his religious beliefs even though the same diet is available to Jews who observe Jewish dietary laws.

Madison, *Charles*, and *Mayweathers* all correctly concluded -- with appropriate citations to *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), *Board of Education v. Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), and other relevant decisions of this Court – that the challenges to RLUIPA were governed by the settled rule that a legislative accommodation lifting a substantial government-imposed burden on religious exercise does not violate the Establishment Clause. *Madison*, 355 F.3d at 317; *Charles*, 348 F.3d at 610-611; *Mayweathers*, 313 F.3d at 1068-1069.

The Sixth Circuit's opinion in this case candidly conceded that the scope of the split between the circuits is even more serious than indicated by the difference between its opinion in this case and the opinions of the three other circuits. It observed that, in addition to court of appeals decisions rejecting Establishment Clause attacks on RLUIPA, "five circuits, including the Seventh and the Ninth, have concluded that the identical language in RFRA [the Religious Freedom Restoration Act of 1993] does not violate the Establishment Clause." 349 F.3d 261-262. Moreover, the two district court opinions, that

the Sixth Circuit relied on as its authority, have been overruled or reversed. See *Madison v. Riter*, 240 F.Supp.2d 566 (W.D.Va. 2003), *reversed by Madison v. Riter*, 355 F.3d 310, (4th Cir. 2003) (*cert. pending*, No. 1404.); *Kilaab Al Ghashiyah (Kahn) v. Dept. of Corrections*, 250 F.Supp. 2d 1016 (E.D. Wis. 2003), *overruled by Charles v. Verhagen*, 348 F.3d 601 (7th Cir. Oct 30, 2003).

In short, the decision of the Sixth Circuit Court of Appeals creates a serious circuit split.

B. The Court of Appeals' Ruling that RLUIPA is Unconstitutional Undermines the Authority of All Legislatures to Enact Laws Accommodating Religious Exercise

The decision of the Sixth Circuit in this case provided an erroneous answer to the important question of whether Congress' enactment of RLUIPA to lift unjustified, government-imposed burdens on religious exercise violates the Establishment Clause. The three other circuits that have also addressed this question have correctly ruled that RLUIPA did not violate the Establishment Clause. Therefore, this Petition should be granted to resolve the split between the circuits and make clear that Congress and other legislative branches of government do not violate the Establishment Clause by enacting RLUIPA and similar laws.

As previously explained, the language of RLUIPA that is at the heart of this appeal provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to [a state] institution" unless the "imposition of the burden on that person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling

governmental interest." 42 U.S.C. § 2000cc-1(a).

Congress enacted this statute for the purpose of preventing the imposition of unjustified burdens on, and widespread discrimination against, the religious exercise of prisoners and other institutionalized individuals. See the statements of co-sponsor Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01, S7775 (2000). As already indicated in the statement of the case, the record in this case and the facts of the other Court of Appeals decision upholding the constitutionality of RLUIPA demonstrate that Congress' concern about arbitrary and discriminatory official treatment of the religious exercise of institutionalized persons is no chimera.

The Sixth Circuit's primary error was its failure to recognize that RLUIPA is constitutional because it is completely consistent with *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, supra.* In *Amos*, this Court held that Congress does not establish religion by enacting a wholesale exemption which lifts a governmentally-imposed burden on religious organizations in order to accommodate their religious exercise. The burden in *Amos* was imposed in the form of a federal statute prohibiting religious discrimination in employment. The burden was lifted by inclusion of a broad statutory exemption that excused religious organizations from having to comply with the anti-employment discrimination law. According to the *Amos* opinion, "it is a permissible legislative purpose to alleviate significant government interference with the ability of religious organizations to carry out their religious missions." 483 U.S. at 335.

The Court of Appeals misapplied *Amos* in several ways. First, the Court stated as a premise that the Free Exercise rights of prisoners are ordinarily limited by the relaxed standard of *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabbaz*, 482 U.S. 342 (1987). 349 F.3d at 263-264. Then, based on this premise, it mistakenly concluded that a prison regulation that complies with *Turner* and *O'Lone* imposes no burden on religious exercise that RLUIPA can lift. Therefore, in its mistaken view, a statutory accommodation that provides more protection for inmates' religious exercise than do *Turner* and *O'Lone* violates the Establishment Clause. *Id.* In other words, according to the Sixth Circuit, the only government burden that Congress can lawfully accommodate is one that creates a violation of the Establishment Clause and, presumably, the Free Exercise Clause. *Id.*

However, this Court has never held that a legislative accommodation of religion is unconstitutional merely because it exceeds the deferential Establishment Clause and Free Exercise Clause standards applicable to prisoners. Indeed, in *Madison v. Riter*, the Fourth Circuit explicitly concluded that such an accommodation was permissible. There, Judge Wilkinson observed that "The deferential test that courts customarily apply to prison regulations, however, does not operate to prevent legislative bodies from adopting a more searching standard." *Madison, supra at* 315, n. 1.

Judge Wilkinson's observation is clearly correct because this Court has consistently invited legislatures to accommodate religion without regard to whether the legislative accommodation mirrors pre-existing Establishment Clause and Free Exercise

Clause standards. In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), this Court stated:

> Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather there is "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. . . .'"

512 U.S. at 705, quoting *Amos*, supra at 334. In a concurring opinion, Justice Kennedy observed that "'[t]he limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause." 512 U.S. at 724, quoting *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 673 (1970).

Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872 (1990), explicitly invited legislative accommodation of religious exercise by means of statutes enacted to lift constitutionally permissible, but nonetheless onerous, government burdens on religious exercise.

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. Congress accepted this invitation when it enacted RLUIPA.

The Court of Appeals also erroneously concluded that RLUIPA had the improper effect of establishing religion because it accommodated religious exercise without simultaneously accommodating all other fundamental constitutional rights. 349 F.3d at

264-267. In its view, such an accommodation violates the Establishment Clause because it carries a message of endorsement of religion and because Congress did not support RLUIPA with actual proof that religious rights were more at risk in a prison setting than other fundamental rights.

The principal authority it cites for the foregoing proposition is the district court decision in *Madison v. Riter*, 240 F.Supp.2d 566 (W.D.Va. 2003). However, following the Sixth Circuit's heavy reliance on that decision, it was reversed on appeal by the Fourth Circuit. *Madison v. Riter, supra.* The reversal was based in part on the admonition in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, supra,* that "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Madison v. Riter*, 355 F.3d at 318, citing *Amos*, 483 U.S. at 338. The Fourth Circuit explained:

> We cannot accept the theory advanced by the district court that Congress impermissibly advances religion when it acts to lift burdens on religious exercise yet fails to consider whether other rights are similarly threatened. *Madison*, 240 F.Supp. 2d at 577; see also *Cutter v. Wilkinson*, No. 02-3270, 2003 WL 22513973, at *7-8 (6th Cir. Nov. 7, 2003). There is no requirement that legislative protections for fundamental rights march in lockstep. The mere fact that RLUIPA seeks to lift government burdens on a prisoner's religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights.

Madison, supra, at 318. (A petition for certiorari from the Fourth Circuit's decision in *Madison* is currently pending before this Court *sub nom. Bass v. Madison, supra*).

The Sixth Circuit's insistence that RLUIPA advances religion by accommodating religious exercise without simultaneously accommodating all other constitutional rights

misses the entire point for the enactment of RLUIPA. It is clear that RLUIPA was enacted for the express purpose of preventing arbitrary and discriminatory treatment of religious exercise; this is indicated in the Congressional Record. See, for example the statement of Representative Canady at 146 Cong. Rec. H1791. Congress' recognition of the need for RLUIPA is also supported by the arbitrary and discriminatory treatment of the Petitioners' non-mainstream religions as well as the facts of the four Court of Appeals cases that have already addressed RLUIPA's constitutionality. See, *supra* at pp. 6-7.

What the Sixth Circuit failed to understand is that selective accommodation of fundamental rights is the norm for prison inmates. For example, an inmate can marry while in prison. *Turner v. Safley, supra.* Yet, the same prisoner cannot join a prisoners' union. *Jones v. North Carolina Prisoners Union*, 433 U.S. 119 (1977). Similarly, an inmate can send confidential letters to his attorney, but does not have a right to a private interview with a member of the press. *Houchins v. KQED*, 438 U.S.1 (1978). Of all fundamental rights, accommodation of religion is most suitable in the prison context. It is for this reason that the State of Ohio has long employed full-time prison chaplains to assure inmates of mainstream religions will have access to clergy.

The Sixth Circuit also erroneously concluded that the Establishment Clause had been violated because Congress enacted RLUIPA without establishing a specific factual basis to support its conclusion that religious rights were more at risk than other rights in a prison setting. 349 F.3d at 265. It cited no authority for this contention other than the

district court decision in *Madison, supra*, which was subsequently reversed . Nor could it cite such authority. None exists.

Even if there were a need for evidence that religious rights are at special risk in order to justify RLUIPA, there is already evidence of ODRC hostility towards non-mainstream religions in the record of this case that is consistent with Congress' view that prison officials are often intolerant of such religions. During discovery, ODRC defendants produced an unusually candid inter-office memorandum from an Ohio prison chaplain written in response to an inmate request for religious accommodation. It stated, "I truly regret that the House of Yahweh is not a mainstream religion because that would help us come to a more agreeable resolution of some of your requests." ®. No. 179; Inter-office Communication, Aug. 6, 1996; Plaintiffs' Reply to Partial Motion to Dismiss. App. G.)

Equally telling is the brief filed in the Respondents' appeal to the Sixth Circuit in this case. It argued that Petitioners are not entitled to accommodation of their religious exercise because their beliefs are so offensive that public funds spent to accommodate their beliefs will result in criticism of Ohio corrections officials for "such patently offensive use of public resources." (Defendant-Appellants' Opening Brief on Appeal, p. 60). Also, see *Flagner v. Wilkinson*, 241 F.3d 475 (6th Cir. 2001), which held that a complaint alleging that ODRC officials forcibly removed the beard of an inmate who was a member of a non-mainstream branch of Judaism stated a claim for injunctive relief. The holding was premised on the fact that the beard was an element of the

inmate's religious exercise.

A grant of this Petition for Certiorari is particularly important because the Sixth Circuit's holding and rationale are so sweeping that, if its opinion stands, any court that applies it will be required to strike down all accommodations that do not remedy full-fledged violations of the Free Exercise or Establishment Clauses. The opinion will require invalidation of state and federal statutes and regulations modeled on the religious accommodation previously approved by this Court's decision in *Amos*. For example, the United States Air Force would be prohibited from authorizing the wearing of religious head coverings by Air Force personnel while in uniform because the accommodation is not required by the Free Exercise Clause and no such accommodation is granted to non-religious, expressive apparel. Compare *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that Free Exercise Clause does not bar disciplining of uniformed, Jewish Air Force officer for wearing a yarmulke) with subsequently promulgated Dept. of Air Force, Reg. 35-10, ¶ 2- 28(b)(2) (April 1989) (authorizing the wearing of religious head covering while in uniform).[9] Public school authorities would be forbidden from implementing the released-time programs permitting public school children to attend periodic, off-site, religious instruction approved in *Zorach v. Clausen*, 343 U.S. 306 (1952), because no corresponding leave is granted to children wishing to receive off-site, secular instruction. States would be forbidden from enacting laws accommodating the

[9]This accommodation was cited with approval by Justice Kennedy in *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 726-727 (1994) (Kennedy, J., concurring).

sacramental use of peyote by American Indians notwithstanding *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. at 890, because those accommodations are not extended to other drugs, or to peyote use as a political protest of existing drug laws.

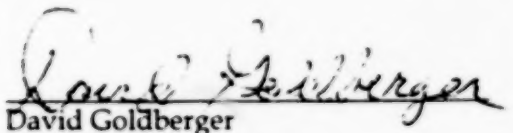
For the same reasons, it would be impermissible for any departments of corrections to hire prison chaplains ordained as ministers in mainstream religions to administer and provide for the religious needs of prison inmates. It would also be impermissible for states to exempt ordained ministers from the general rule that no one shall render services or engage in the practice of psychology without a license. See O.R.C. § 4732.22(F). And, it would be impermissible for states to exempt religious groups from general prohibitions against the inhumane slaughtering of animals where the prohibition would hinder the religious freedom of that group. See O.R.C. 945.01-945.02. But see *Jones v. Butz*, 374 F.Supp. 1284 (S.D.N.Y. 1974), aff'd 419 U.S. 806 (1974) (holding that federal statute exempting religious, ritual slaughter from animal slaughter regulations does not violate the Establishment Clause).

The foregoing examples underscore the sweeping limitations that will be imposed on legislative efforts to accommodate religious exercise, should this Court allow the Sixth Circuit's decision to stand.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,



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LEXSEE 349 F.3D 257

JON B. CUTTER; J. LEE HAMPTON, Plaintiffs-Appellees, UNITED STATES OF AMERICA, Intervenor-Appellee, v. REGINALD WILKINSON; DAVID SCHWARTZ; NICHOLAS G. MENEDEZ; L. C. COVAL; K. L. BROWN; GEORGE D. ALEXANDER; DIANNE WALKER; JIM ERWIN; RON CARNEIN; RUDY PRINGLE; WALTER LOWERY, Defendants-Appellants. JOHN MILLER, et al., Plaintiffs-Appellees, UNITED STATES OF AMERICA, Intervenor-Appellee, v. REGINALD WILKINSON; DAVID SCHWARTZ; TERRY COLLINS; CHERYL HART; CHARLES R. GRIFFIN; CHARLES GRIFFIN, CHAPLAIN, DEFENDANTS-APPELLANTS. JOHN W. GERHARDT, Plaintiff-Appellee, UNITED STATES OF AMERICA, Intervenor-Appellee, v. ALAN LAZAROFF, WARDEN; KENNETH BYERS; DON WILSON; MARY HENDERSON; SHERRY WILLIAMSON; KRISTINA HACKETT; STEVEN WEINGART; RON CLIFTON; ROBERT ENGLUND; CHARLES CONRAD; STACHA DOTY; JACK TAYLOR; WILLIAM BLANEY; CAROL MARTIN; JUNE COLEMAN; DAVE MORRIS; VANCE YORK; SUSAN COOLIE; STEPHANIE WALKER; RACHEL HETTINGER; KENNETH E. MCDONALD, Defendants-Appellants.

Nos. 02-3270/02-3299/02-3301

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

349 F.3d 257; 2003 U.S. App. LEXIS 22840; 2003 FED App. 0397P (6th Cir.)

September 10, 2003, Argued
November 7, 2003, Decided
November 7, 2003, Filed

SUBSEQUENT HISTORY: Counsel Corrected December 15, 2003. Rehearing denied by *Cutter v. Wilkinson, 2004 U.S. App. LEXIS 4294 (6th Cir., Mar. 3, 2004)*
US Supreme Court certiorari granted by, Motion granted by *Cutter v. Wilkinson, 160 L. Ed. 2d 221, 125 S. Ct. 308, 2004 U.S. LEXIS 6695 (U.S., 2004)*
Reversed by, Remanded by *Cutter v. Wilkinson, 2005 U.S. LEXIS 4346 (U.S., May 31, 2005)*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 97-00382; 98-00275; 95-00517. James L. Graham, Edmund A. Sargus, Jr., District Judges.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff prisoners contended that defendant corrections officials violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5. The officials filed motions to dismiss the RLUIPA claims, challenging the constitutionality of *42 U.S.C.S. § 2000cc-1*, which were denied by the United States District Court for the Southern District of Ohio at Columbus. The officials sought interlocutory appeal.

OVERVIEW: The court reasoned that the RLUIPA, as applied to institutionalized persons--specifically, *42 U.S.C.S. § 2000cc-1*--violated the Establishment Clause because it had the primary effect of advancing religion. The court noted that RLUIPA's enhanced protection for religious rights might not have violated the First Amendment requirement of neutrality if Congress had enacted RLUIPA based upon evidence that religious rights were at greater risk of deprivation in the prison system than other fundamental rights. Furthermore the primary effect of RLUIPA was not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners. The court noted that in addition to its message of endorsement, RLUIPA also had the effect of encouraging prisoners to become religious in order to enjoy greater rights. The court rejected the reasoning of previous cases upholding RLUIPA because RLUIPA did not address a particular burden on religious exercise, but instead exempted religious prisoners from many generally applicable prison regulations.

OUTCOME: The district court's denial of the corrections officials' motions to dismiss was reverse and the case was remanded for further proceedings.

LexisNexis(R) Headnotes

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
[HN1] The Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, defines "religious exercise" as any exercise of religion, whether or not compelled by, or central to, a system of religious belief. *42 U.S.C.S. § 2000cc-5*(7)(A).

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
[HN2] The requirement of the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, requiring strict scrutiny stands in sharp contrast to the United States Supreme Court's previous decisions, which have held that the courts should apply a rational-relationship review to restrictions upon inmates' fundamental rights.

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
Real & Personal Property Law > Zoning & Land Use > Statutory & Equitable Limits
[HN3] The Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, creates a private right of action. Any person may assert a violation of chapter 21C, *42 U.S.C.S. § 2000cc* et seq., as a claim or defense in a judicial proceeding and may obtain appropriate relief against a government. *42 U.S.C.S. § 2000cc-2*(a). The United States may also seek injunctive or declaratory relief to enforce the statute. *42 U.S.C.S. § 2000cc-2*(f).

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN4] See U.S. Const. amend. I.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN5] Neutrality is the fundamental requirement of the Establishment Clause, which prohibits government from either endorsing a particular religion or promoting religion generally. A principle at the heart of the Establishment Clause is that government should not prefer one religion to another, or religion to irreligion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN6] The United States Supreme Court has articulated a three-part test to determine whether a statute violates the Establishment Clause. A statute (1) must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not create excessive government entanglement with religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN7] The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. Lemon's requirement of a secular purpose does not mean that the law's purpose must be unrelated to religion. Instead, the purpose prong aims at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN8] It is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN9] That portion of the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, that applies to institutionalized persons specifically, *42 U.S.C.S. § 2000cc-1* is unconstitutional because it has the primary effect of advancing religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN10] The effect prong of the Lemon test asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. In evaluating this prong, the two most relevant factors are (1) whether a particular government action benefits both secular and religious entities, and (2) whether the action will induce religious exercise, rather than only protecting it.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN11] The Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights.

Constitutional Law > Civil Rights Enforcement > Prisoners
[HN12] Prior to the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, restrictions imposed by prison officials upon inmates' fundamental rights were subject to a rational-relationship review which requires courts to consider: (1) whether there is a valid, rational connection between the prison regulation and a legitimate government interest; (2) whether inmates have alternative means of exercising the right in question; (3) the impact of a requested accommodation of the right upon guards and other inmates; and (4) the absence of alternatives to the regulation. The rational-relationship test has been applied to claimed violations of various fundamental rights, including the right to the free exercise of religion, the right to freedom of speech, the right to marry, the right to privacy, the right to meaningful access to the courts, and the right to be free from racial discrimination.

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN13] The primary effect of the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C.S. § 2000cc* to 2000cc-5, is not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners. When Congress acts to lift the limitations on one right while ignoring all others, it abandons neutrality towards these rights, placing its power behind one system of belief. When the one system of belief protected is religious belief, Congress has violated the basic requirement of neutrality embodied in the Establishment Clause.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN14] In evaluating a statute's effect, a court must ask whether an objective observer, acquainted with the text, legislative history, and implementation of the enactment would view it as state endorsement of religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN15] When Congress has acted to impose an affirmative burden on religion, it is necessary for Congress to remove that burden in order to retain a position of neutrality towards religious belief. However, when Congress acts to provide religious inmates, and only religious inmates, with a level of constitutional protection that the United States Supreme Court has deemed unnecessary to protect religious rights, it has gone beyond protecting religion to affirmatively advancing it.

Constitutional Law > Civil Rights Enforcement > Prisoners > Freedom of Religion
Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN16] *42 U.S.C.S. § 2000cc-1* violates the Establishment Clause.

COUNSEL: ARGUED: Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellants.

David A. Goldberger, OHIO STATE UNIVERSITY COLLEGE OF LAW-CLINICAL PROGRAMS, Columbus, Ohio, Michael S. Raab, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellants.

David A. Goldberger, OHIO STATE UNIVERSITY COLLEGE OF LAW-CLINICAL PROGRAMS, Columbus, Ohio, Michael S. Raab, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Benson Wolman, WOLMAN, GENSHAFT & GELMAN, Columbus, Ohio, for Appellees.

Marc D. Stern, AMERICAN JEWISH CONGRESS, STEPHEN WISE CONGRESS HOUSE, New York, New York, for Amici Curiae.

JUDGES: Before: MOORE and GILMAN, Circuit Judges; TARNOW, District Judge. *

* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY: RONALD LEE GILMAN

OPINION: [*259] [***4]

RONALD LEE GILMAN, Circuit Judge. Plaintiffs in these three consolidated cases [**2] are Ohio prisoners who contend, among other claims, that various Ohio corrections officials have violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C. § 2000cc-2000cc-5*. The defendant officials filed motions to dismiss the RLUIPA claims, challenging the constitutionality of *42 U.S.C. § 2000cc-1*, the section of the Act that applies to institutionalized persons. Their motions were denied by the district court. In this interlocutory appeal, defendants contend that RLUIPA (1) exceeds Congress's powers under both the Spending and *Commerce Clauses*, (2) violates states' rights under the *Tenth Amendment*, and (3) improperly advances religion in violation of the *Establishment Clause of the First Amendment*. For the reasons [*260] set forth below, we agree that the portion of RLUIPA that applies to institutionalized persons--specifically, *42 U.S.C. § 2000cc-1*--violates the *Establishment Clause*. We therefore REVERSE the district court's denial of defendants' motions to dismiss and REMAND the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background [**3]

Because this appeal involves a facial challenge to RLUIPA, the facts of the individual cases are not particularly relevant. [***5] The prisoners in all three cases generally allege that officials with the Ohio Department of Rehabilitation and Corrections (ODRC) violated RLUIPA by refusing to accommodate the prisoners' religious beliefs and practices. Defendants, on the other hand, contend that RLUIPA has allowed inmate gangs to claim "'religious' status in order to insulate their illicit activities from scrutiny."

What *is* relevant to this case is the history and substance of RLUIPA. In 1990, the Supreme Court held that the United States Constitution does not require that government have a compelling state interest in order to enact a law of general applicability that incidentally burdens the exercise of religion. *Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*. Congress responded in 1993 by enacting the Religious Freedom Restoration Act (RFRA), *42 U.S.C. § § 2000bb--2000bb-4*. RFRA required that any governmental attempt to "substantially burden" the exercise of religion must be the [**4] least restrictive means of furthering a compelling state interest. *42 U.S.C. § 2000bb-1(b)*. The Supreme Court held RFRA unconstitutional insofar as it applied to states and localities because the statute exceeded Congress's powers under the *Fourteenth Amendment. City of Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997)*.

Congress reacted to *Boerne* by passing RLUIPA in 2000. RLUIPA has the same substantive standard as RFRA. It provides, in relevant part, that "no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest. *42 U.S.C. § 2000cc-1(a)*. [HN1] The Act defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *42 U.S.C. § 2000cc-5(7)(A)*. [HN2] RLUIPA's requirement of strict scrutiny stands in sharp contrast to the Supreme Court's previous decisions, which have held that the courts should [**5] apply a rational-relationship [***6] review to restrictions upon inmates' fundamental rights. *See Turner v. Safley, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)* (applying the rational-relationship test to prison rules regulating prisoner correspondence and marriage); *O'Lone v. Estate of Shabazz, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987)* (applying the rational-relationship test to prison rules regulating prisoners' religious exercise).

Congress enacted RLUIPA pursuant to its powers under the Spending Clause, *U.S. Const. art. I, § 8, cl. 1*, and the *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*. RLUIPA applies where "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance." *42 U.S.C. § 2000cc-1(b)(1)*. The Act is also applicable where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign [*261] nations, among the several States, or with Indian tribes." *42 U.S.C. § 2000cc-1(b)(2)*.

[HN3] RLUIPA creates a private right of action. Any person may "assert a violation [**6] of this chapter as a claim or defense in a judicial proceeding" and may obtain "appropriate relief against a government." *42 U.S.C. § 2000cc-2(a)*. The United States may also seek injunctive or declaratory relief to enforce the statute. *42 U.S.C. § 2000cc-2(f)*.

RLUIPA's congressional sponsors specifically noted that they expected federal courts to respect the decisions of prison officials as to what restrictions on the exercise of religion are necessary in the prison context. A joint statement to the Senate expressed the sponsors' belief that federal courts would "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with considerations of cost and limited resources." Statements of Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01, S7775 (2000). [***7]

B. Procedural background

The plaintiff prisoners brought suit against various Ohio corrections officials based upon claims arising under the *First* and *Fourteenth Amendments*. RLUIPA went into effect [**7] after suit was filed, causing plaintiffs to amend their complaints to include claims under the Act. Defendants then filed motions to dismiss the RLUIPA claims, arguing that the Act was unconstitutional. (All references to RLUIPA are to *42 U.S.C. § 2000cc-1* only, the portion of the Act that applies to institutionalized persons.) The United States intervened to defend the constitutionality of the Act. All three cases were consolidated in order to adjudicate the motions to dismiss at the same time.

On August 27, 2001, the magistrate judge filed a Report and Recommendation, which concluded that the statute was constitutional and recommended that the district court deny defendants' motions to dismiss. The district court entered an opinion and order adopting the Report and Recommendation on February 25, 2002. Approximately a year and a half later, on August 4, 2003, the court certified its February 25, 2002 order for immediate appeal pursuant to *28 U.S.C. § 1292(b)*. The parties then filed a joint petition for leave to appeal with this court on August 6, 2003, within the 10-day time limit imposed by the statute. We have previously granted [**8] the petition for leave to appeal.

II. ANALYSIS

A. Lineup of the courts

The Supreme Court has not yet considered the constitutionality of RLUIPA. Justice Stevens, however, in his concurring opinion in *Boerne*, concluded that RLUIPA's predecessor, RFRA, violated the *Establishment Clause*: [***8]

> In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a "law respecting an establishment of religion" that violates the *First Amendment to the Constitution*. . . . The statute has provided [religious organizations] with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the *First Amendment*.

Boerne, 521 U.S. at 536-37 (1997) (Stevens, J., concurring).

Two circuits, without reference to Justice Stevens's concurring opinion, have come to the opposite conclusion regarding the constitutionality of RLUIPA. *See* [*262] *Charles v. Verhagen, 348 F.3d 601, 2003 U.S. App. LEXIS 22297, No. 02-3572 (7th Cir. Oct. 30, 2003)*; *Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002)*. Furthermore, five circuits, including the Seventh and Ninth, have concluded that the identical operative [**9] language in RFRA does not violate the *Establishment Clause*. *See In re Young), 141 F.3d 854, 863 (8th Cir. 1998)*; *Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir. 1997)*; *Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114, 138 L. Ed. 2d 1007, 117 S. Ct. 2502 (1997)*; *EEOC v. Catholic Univ. of Am., 317 U.S. App. D.C. 343, 83 F.3d 455, 470 (D.C. Cir. 1996)*; *Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), rev'd on other grounds, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1998)*. Two district court opinions, in addition to the one below, have also concluded that RLUIPA is constitutional. *See Johnson v. Martin, 223 F. Supp. 2d 820 (W.D. Mich. 2002)*; *Charles v. Verhagen, 220 F. Supp. 2d 955 (W.D. Wis. 2002), aff'd, 2003 U.S. App. LEXIS 22297, No. 02-3572 (7th Cir. Oct. 30, 2003)*.

Against this apparent juggernaut of circuit and district court opinions stand two district court decisions that reach the opposite conclusion. One is *Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003)* (Turk, J.), and the other is [**10] *Kilaab Al Ghashiyah (Khan) v. Dep't of Corrections, 250 F. Supp. 2d 1016 (E.D. Wis. 2003)* (Adelman, J.), *overruled by Charles v. Verhagen,* [***9] *2003 U.S. App. LEXIS 22297, No. 02-3572 (7th Cir. Oct. 30, 2003)*. Both are remarkably well-worded and persuasive opinions that clearly set forth the history of RLUIPA, the analytical basis for concluding that RLUIPA violates the *Establishment Clause*, and the unpersuasive nature of the contrary opinions. Indeed, our own analysis can (and will) be considerably streamlined by repeated references to *Madison* and *Ghashiyah*. (Inexplicably, the Seventh Circuit in *Charles* makes no reference to either of these district court opinions.)

B. RLUIPA violates the *Establishment Clause* because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation

The *Establishment Clause of the First Amendment to the U.S. Constitution* states: [HN4] "Congress shall make no law respecting an establishment of religion." [HN5] Neutrality is the fundamental requirement of the *Establishment Clause*, which prohibits government from either endorsing a particular religion or promoting religion generally. [**11] *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703, 129 L. Ed. 2d 546, 114 S. Ct. 2481 (1994)* ("[A] principle at the heart of the *Establishment Clause* [is] that government should not prefer one religion to another, or religion to irreligion."); *see also Ghashiyah, 250 F. Supp. 2d at 1021* (collecting cases that discuss the neutrality requirement).

In *Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*, [HN6] the Supreme Court articulated a three-part test to determine whether a statute violates the *Establishment Clause*. A statute (1) "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it must not create "excessive government entanglement with religion." *Id. at 612-13* (internal quotation marks and citations omitted). The Supreme Court suggested a modification to the *Lemon* test in *Agostini v. Felton, 521 U.S. 203, 232-35, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997)*, in the context of considering the [***10] constitutionality of government aid to parochial schools, [**12] where the Court proceeded to analyze entanglement under the effect prong rather than as a [*263] separate factor. Based upon our precedent of applying the *Lemon* test other than in aid-to-education cases, however, we will proceed with the traditional three-part *Lemon* analysis. *See, e.g., Adland v. Russ, 307 F.3d 471, 479 (6th Cir. 2002)* (applying the *Lemon* test to decide that a Kentucky legislative resolution directing the state to move a Ten Commandments monument to a permanent site on the state capitol grounds violated the *Establishment Clause*).

1. The purpose of RLUIPA

[HN7] "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard, 482 U.S. 578, 585, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)* (quoting *Lynch v. Donnelly, 465 U.S. 668, 690, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)* (O'Connor, J., concurring)). *Lemon*'s requirement of a secular purpose "does not mean that the law's purpose must be unrelated to religion . . . ." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987)*. [**13] Instead, the purpose prong "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.*

In *Amos*, the Supreme Court considered whether Congress had violated the *Establishment Clause* by exempting religious organizations from Title VII's prohibition against religious discrimination in employment. *Amos* held that [HN8] "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* In the present case, plaintiffs argue that RLUIPA has a virtually identical purpose: to alleviate significant interference by prison officials with the ability of prisoners to exercise their religious beliefs. But material [***11] differences exist between the application of RLUIPA in a prison setting and the Title VII exemption at issue in *Amos*.

One key difference is that the exemption in *Amos* was arguably necessary to avoid a violation of the *Establishment Clause*. Without the exemption, Title VII would have required courts to interfere [**14] with the internal workings of religious organizations, and fear of liability might have affected the way religious organizations carried out their missions. *Id. at 336*; *see also id. at 344* (Brennan, J., concurring) ("A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity."). Enacting RLUIPA, on the other hand, was not even arguably necessary to avoid a violation of the *Establishment Clause*. The Supreme Court had previously held that government interference with prisoners' fundamental rights is not subject to strict scrutiny, as RLUIPA requires, but only to a rational-relationship review. *See Turner, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254*; *O'Lone, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400*.

Another key difference between RLUIPA and the exemption in *Amos* is that RLUIPA sweeps much more broadly. As one commentator noted about RFRA, the predecessor to RLUIPA that has identical substantive provisions:

> Comparing RFRA to *Amos* is like comparing apples to oranges. RFRA, unlike [**15] *Amos*, does not exempt religion from regulation for the purpose of avoiding an *Establishment Clause* violation. Rather, RFRA institutes a standard of review in every case which implicates religious conduct. . . . *Amos* did not involve [*264] a law that exempted religion from every law in the country. Rather, it permitted the exemption of religious employers from a particular requirement in prescribed circumstances. The law in *Amos* lacked RFRA's vast scope; therefore, [***12] *Amos* cannot dictate how RFRA fares under the *Establishment Clause*.
>
> Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period, 1 U. Pa. J. Const. L. 1, 13-14 (1998)*.

The broader scope of RLUIPA suggests that its actual purpose is not to accommodate religion by removing a particular obstacle to religious exercise, but "to advance religion in prisons relative to other constitutionally

protected conduct." *Ghashiyah, 250 F. Supp. 2d at 1024.* If that is indeed the true purpose of RLUIPA, then Congress has "abandoned neutrality and acted with the purpose of furthering religion," in violation of the *Establishment Clause*'s fundamental command of [**16] governmental neutrality. *Id. at 1025.*

Resolution of the question of whether RLUIPA has the proper purpose of alleviating government interference with religious exercise or the prohibited purpose of advancing religion in prisons is not necessary to our ultimate decision regarding the Act's constitutionality. Even if the purpose of RLUIPA fits within the rule of *Amos*, [HN9] RLUIPA is still unconstitutional because it has the primary effect of advancing religion. *See Amos, 483 U.S. at 334-35* ("At some point, accommodation may devolve into an unlawful fostering of religion . . . .") (internal quotation marks omitted).

2. The effect of RLUIPA

[HN10] "The effect prong [of the *Lemon* test] asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly, 465 U.S. 668, 690, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)* (O'Connor, J., concurring). In evaluating this prong, the two most relevant factors are (1) whether a particular government action benefits both secular and religious entities, and [***13] (2) whether the action will induce religious [**17] exercise, rather than only protecting it. *See Ghashiyah, 250 F. Supp. 2d at 1025-26* (collecting authorities that have used these factors in *Establishment Clause* cases). Applying these factors to the present case demonstrates that [HN11] RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights.

[HN12] Prior to RLUIPA, restrictions imposed by prison officials upon inmates' fundamental rights were subject to a rational-relationship review, *see Turner, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254*; *O'Lone, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400*, which requires courts to consider: (1) whether there is a "valid, rational connection" between the prison regulation and a legitimate government interest; (2) whether inmates have alternative means of exercising the right in question; (3) the impact of a requested accommodation of the right upon guards and other inmates; and (4) the absence of alternatives to the regulation. *Turner, 482 U.S. at 89-90.* The rational-relationship test has been applied to claimed violations of various fundamental [**18] rights, including the right to the free exercise of religion, *O'Lone, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400*, the right to freedom of speech, *Amatel v. Reno, 332 U.S. App. D.C. 191, 156 F.3d 192 (D.C. Cir. 1998)*, the right to marry, *Turner, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254*, the right to privacy, *Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002)*, the right to meaningful access to the courts, *Lewis v. Casey, 518 U.S. 343,* [*265] *135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996)*, and the right to be free from racial discrimination, *Morrison v. Garraghty, 239 F.3d 648 (4th Cir. 2001).*

In contrast to the highly deferential rational-relationship test, RLUIPA requires courts to apply strict scrutiny to all substantial burdens upon the free exercise of religion. *Madison* eloquently explained the dramatic changes imposed by RLUIPA:

> Under RLUIPA, prison regulations that substantially burden religious belief, including those that are generally [***14] applicable and facially neutral, are judged under a strict scrutiny standard, requiring prison officials, rather than the [**19] inmate, to bear the burden of proof that the regulation furthers a compelling penological interest and is the least restrictive means of satisfying this interest. *42 U.S.C. § 2000cc-1.* As is well known from the history of constitutional law, the change that RLUIPA imposes is revolutionary, switching from a scheme of deference to one of presumptive unconstitutionality. *See Smith, 494 U.S. at 888.* Instead of rational, the penological interest under RLUIPA must be of the highest order, *see Wisconsin v. Yoder, 406 U.S. 205, 215, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972)*; *Jenkins v. Angelone, 948 F. Supp. 543, 546 (E.D. Va. 1996)*; instead of focusing on the prison inmate's ability to find other avenues to exercise his belief, a court is required to focus on the prison administrator's choice among regulatory options, *see 42 U.S.C. § 2000cc-1(a)(2)*; instead of placing the burden of proof on an inmate, RLUIPA throws the burden on prison officials, *see id. § 2000cc-1(a).* It is hard to imagine a greater reversal of fortunes for the religious rights of inmates than the one involved [**20] in the passage of RLUIPA.
>
> *240 F. Supp. 2d at 575.*

RLUIPA's enhanced protection for religious rights might not violate the *First Amendment* requirement of neutrality if Congress had enacted RLUIPA based upon evidence that religious rights are at greater risk of deprivation in the prison system than other fundamental rights. The exemption in *Amos*, for example, had the effect of maintaining congressional neutrality toward religion because "Title VII's prohibitions on hiring or firing on the basis of religion had a much greater negative impact on the purpose and mission of a religious organization in comparison to the effect of the prohibitions on a secular institution." *Madison, 240 F. Supp. 2d at 577 n.9.* In contrast, Congress enacted RLUIPA "in the absence of any proof that religious rights are more at

risk [***15] in prison than other fundamental rights, with the knowledge that strict scrutiny is not required to protect the religious belief of prisoners under the *Free Exercise Clause*," *Madison, 240 F. Supp. 2d at 576*, and with the knowledge that prisoners already have a remedy for violations of their constitutional rights. [**21] "Such an action, while labeled a neutral 'accommodation,' is not in fact neutral at all, and the Court is not allowed to defer to the mere characterization of RLUIPA as such." *Id. at 576*; *see also Ghashiyah, 250 F. Supp. 2d at 1027* ("The effect [of RLUIPA], therefore, is to provide greater protection to religiously motivated conduct than other conscientious conduct.").

Although the supporters of RLUIPA stated that "some institutions restrict religious liberty in egregious and unnecessary ways," *see* Statements of Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01, S7775 (2000), RLUIPA supporters offered no evidence that inmates' other constitutional [*266] rights "are not similarly threatened by prison administrators," *Madison, 240 F. Supp. 2d at 575.* And if prison officials in fact "restrict religious liberty [or other fundamental rights] in egregious and arbitrary ways," prisoners already have a remedy under *Turner* and *O'Lone*, which require prison policies to be "legitimate and neutral," *Turner, 482 U.S. at 90*, and which held that strict scrutiny is not necessary to protect the religious rights of prisoners. [**22] *Ghashiyah, 250 F. Supp. 2d at 1031* (noting that *O'Lone* already provides prisoners a remedy for violations of their religious rights).

Madison provides an excellent illustration of the effect of RLUIPA upon the rights of prisoners:

> Assume, for example, that a prison official confiscates white supremacist literature held by two different inmates. One inmate is a member of the Aryan Nation solely because of his fanatical belief that a secret Jewish conspiracy exists to control the world. The second [***16] inmate holds the white supremacist literature because he is a member of the Church of Jesus Christ Christian, Aryan Nation ("CJCC"). The non-religious inmate may challenge the confiscation as a violation of his rights to free expression and free association. A court would evaluate these claims under the deferential rational relationship test in *Turner*, placing a high burden of proof on the inmate and leaving the inmate with correspondingly dim prospects of success. However, the religious inmate, as a member of the CJCC, may assert a RLUIPA claim, arguing that the confiscation places a substantial burden on his religious exercise. The religious [**23] white supremacist now has a much better chance of success than the non-religious white supremacist, as prison officials bear the burden of proving that the prison policy satisfies a compelling interest and is the least restrictive means of satisfying the interest. The difference in the level of protection provided to each claim lies not in the relative merits of the claims, but lies instead in the basis of one claim in religious belief.
>
> *240 F. Supp. 2d at 576* (internal citations omitted). As this example illustrates, [HN13] the primary effect of RLUIPA is not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners. "When Congress acts to lift the limitations on one right while ignoring all others, it abandons neutrality towards these rights, placing its power behind one system of belief. When the one system of belief protected is religious belief, Congress has violated the basic requirement of neutrality embodied in the *Establishment Clause*." *Madison, 240 F. Supp. 2d at 577* (internal citations omitted).

In addition to [**24] its message of endorsement, RLUIPA also has the effect of encouraging prisoners to become religious in order to enjoy greater rights. The Supreme Court has [***17] considered a statute's effect on nonreligious persons as part of the effect analysis. *See Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9, 103 L. Ed. 2d 1, 109 S. Ct. 890 (1989)* (plurality opinion) (holding that government may not compel nonadherents to support religious practices). One effect of RLUIPA is to induce prisoners to adopt or feign religious belief in order to receive the statute's benefits. As *Ghashiyah* explained:

> When inmates see that the rules do not apply with the same force to the religious as to the agnostic or atheist . . ., non-religious prisoners will know what they have to do so that they, too, can benefit from the softer rules: become religious. Considering the meager resources [*267] and opportunities available to them inside prison walls, the compulsion to become religious--created by government--will indeed be strong.
>
> *250 F. Supp. 2d at 1029.*

[HN14] In evaluating a statute's effect, a court must ask "whether an objective observer, acquainted with the [**25] text, legislative history, and implementation of the enactment would view it as state endorsement of religion." *Adland v. Russ, 307 F.3d 471, 484 (6th Cir.*

2002) (internal quotation marks omitted). RLUIPA's legislative history, as previously discussed, offers no evidence that religious rights are at any greater danger of deprivation in prison than are other fundamental rights. As to implementation, RLUIPA's inevitable effect is to give greater freedom to religious inmates, and to induce nonreligious inmates to adopt a religion. An objective observer viewing RLUIPA's text, legislative history, and effect would therefore conclude that the Act conveys a message of religious endorsement.

Plaintiffs, however, point to the following statement from *Amos*: "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *483 U.S. at 337* [***18] (emphasis in original). *Amos* held that the exemption from Title VII did not run afoul of the effect prong of *Lemon* because the government was not an active participant; the statute simply allowed religious [**26] organizations to pursue their religious objectives. *Id.* Plaintiffs contend that RLUIPA has an identical effect. RLUIPA, according to plaintiffs, "does not itself promote or subsidize a religious belief or message; it merely frees religious groups and individuals to practice as they otherwise would in the absence of certain significant state-imposed burdens."

The problem with plaintiffs' argument is that the exemption from Title VII that was at issue in *Amos* simply restored the level of freedom that religious institutions enjoyed before Congress enacted Title VII. By creating the exemption, Congress arguably acted to maintain neutrality toward religion. RLUIPA, on the other hand, does not lift any affirmative burden on the exercise of religion. Instead, by enacting RLUIPA, Congress itself has advanced religion by giving religious prisoners a preferred status in the prison community.

3. The entanglement between government and religion created by RLUIPA

The third prong of the *Lemon* test prohibits an excessive entanglement of government with religion. *Lemon, 403 U.S. at 613*. *Ghashiyah* held that RLUIPA's nebulous definition of religious exercise, [**27] *see 42 U.S.C. § 2000cc-5(7)(A)*, creates an excessive entanglement "because it forces the states to become involved with, knowledgeable about, and exceedingly sensitive to the varied religious practices of their inmates. It also forces the federal courts to become involved in prison administration, an area that the Supreme Court has admonished judges to avoid." *250 F. Supp. 2d at 1031*.

Although *Ghashiyah*'s reasoning is plausible, we question whether RLUIPA requires any greater interaction between [***19] government officials and religion than exists under present law. Assume, for example, that a prisoner who is a member of a nontraditional "religion" claims a *First Amendment* right to a special diet that is required by the prisoner's "religious" beliefs. Before reaching the underlying constitutional claim, a court must first determine (1) whether the "religious" beliefs are sincerely held, and (2) whether the prisoner's beliefs "constitute a religion [*268] within the meaning of the *First Amendment*." *Africa v. Pennsylvania, 662 F.2d 1025, 1029-31 (3d Cir. 1981)* (holding that a prisoner's belief system was not a religion for [**28] purposes of *First Amendment* analysis). Deciding whether a specific act or practice qualifies as "religious exercise" under RLUIPA arguably creates no greater entanglement than deciding whether a particular belief system constitutes a "religion" under the *First Amendment*. However, because we have concluded that RLUIPA has the impermissible effect of advancing religion, we have no need to further explore the question of whether RLUIPA violates *Lemon*'s entanglement prong.

C. The unpersuasive nature of the cases upholding RLUIPA and RFRA

The cases that have upheld RLUIPA and RFRA against constitutional attack have essentially relied on the rationale of *Amos*. *See, e.g.,Charles v. Verhagen, 2003 U.S. App. LEXIS 22297, No. 02-3572, slip op. at 12-13 (7th Cir. Oct. 30, 2003)*; *Mayweathers v. Newland, 314 F.3d 1062, 1068-69 (9th Cir. 2002)*. We believe that such reliance is misplaced. As we have already discussed, the exemption in *Amos* was arguably necessary to avoid an *Establishment Clause* violation. *Amos, 483 U.S. at 336*; *see also id. at 344* (Brennan, J., concurring). But RLUIPA extends protection to religious exercise in prison far beyond what is required [**29] by the *Establishment Clause*; it imposes strict scrutiny where the *Establishment Clause* requires only a rational-relationship review. *See Turner, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254*; *O'Lone, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400*. [***20]

The exemption in *Amos*, moreover, was a narrowly tailored solution to the potential *Establishment Clause* problem created by Title VII's application to religious institutions. RLUIPA, on the other hand, does not address a particular burden on religious exercise, but instead exempts religious prisoners from many generally applicable prison regulations. *See* Hamilton, *1 U. Pa. J. Const. L. at 13-14*. We believe that Professor Hamilton's comment that "comparing RFRA to *Amos* is like comparing apples to oranges" is equally applicable when comparing RLUIPA to *Amos*. *See id.* This same point was expressed somewhat differently in *Madison*:

The difference between *Amos* and RLUIPA is, like all *Establishment Clause* cases, a question of degree. However, the difference in degree between the two is substantial, and congressional neutrality is the line that divides [**30] them. [HN15] When Congress has acted to impose an affirmative burden on religion, it is necessary for Congress to remove that burden in order to retain a position of neutrality towards religious belief. However, when Congress acts to provide religious inmates, and only religious inmates, with a level of constitutional protection that the Supreme Court has deemed unnecessary to protect religious rights, it has gone beyond protecting religion to affirmatively advancing it.

240 F. Supp. 2d at 577 n.9; *see also Ghashiyah, 250 F. Supp. 2d at 1028-29* (noting the fundamental distinction between the exemption in *Amos* and RLUIPA).

These authorities have convinced us that reliance on the rationale of *Amos* to sustain the constitutionality of RLUIPA is misplaced. We therefore conclude that the cases supporting RLUIPA are unpersuasive. [***21]

III. CONCLUSION

For all the reasons set forth above, we hold [HN16] that *42 U.S.C. § 2000cc-1* violates the [*269] *Establishment Clause*. Because of this determination, we have no need to consider the alternative grounds raised by defendants in their constitutional challenge to RLUIPA. We therefore [**31] REVERSE the district court's denial of defendants' motions to dismiss and REMAND the case for further proceedings consistent with this opinion.

John W. Gerhardt, Plaintiff, v. Alan Lazaroff, et al., Defendants, and Lee Hampton, et al., Plaintiffs, v. Reginald Wilkinson, et al., Defendants, and John Miller, et al., Plaintiffs, v. Reginald Wilkinson, et al., Defendants.

Case No. C2-95-517, Case No. C2-97-382, Case No. C2-98-275

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

221 F. Supp. 2d 827; 2002 U.S. Dist. LEXIS 16205

February 25, 2002, Decided
February 25, 2002, Filed

PRIOR HISTORY: *Gerhardt v. Lazaroff, 2001 U.S. Dist. LEXIS 24489* (S.D. Ohio Aug. 27, 2001).

DISPOSITION: [**1] Objections to Magistrate Judge's Report and Recommendation overruled and Report and Recommendation adopted. Defendants' motion to dismiss denied with exception that plaintiffs' claims asserted directly under Ohio Constitution dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Three cases were consolidated for the purpose of issuing a single ruling on defendants' motion to dismiss. The sole issue raised by the motion was the constitutionality of the Religious Land Use and Institutionalized Persons Act, *42 U.S.C.S. § 2000cc* et seq. Each plaintiff alleged denial of the right to practice his religion in a prison setting. A magistrate judge recommended denial of the defendants' motion and defendants objected.

OVERVIEW: Defendants argued that a statute such as Religious Land Use and Institutionalized Persons Act, *42 U.S.C.S. § 2000cc* et seq., which imposes a least restrictive means test on the actions of prison officials is too vague to be enforceable in the prison setting. Since that was the test that Congress selected, as long as the statute was not unconstitutional, it was the court's duty to implement it. For the most part, defendants raised a facial challenge to RLUIPA's constitutionality, and had not contended that under the facts of any of the specific pending cases applying the RLUIPA would produce unconstitutional results. The United States, who had joined plaintiffs, demonstrated an adequate relationship between the purpose of the federal funds and the purposes of RLUIPA, and that the four-part Dole test had been satisfied. Defendants' argument that the RLUIPA constituted governmental endorsement of religion was rejected. The government's decision to lift burdens on the free exercise of religion was not tantamount to government endorsement of either a particular religion or religion in general.

OUTCOME: The objections to the magistrate judge's report and recommendation were overruled and the report and recommendation was adopted, and defendants' motion to dismiss was denied with the exception of plaintiffs' claims asserted directly under the Ohio Constitution, which were dismissed.

LexisNexis(R) Headnotes

Governments > Legislation > Interpretation
[HN1] When evaluating a facial challenge to a statute, a court must be careful not to allow the legislative findings underlying enactment of the statute to be trumped by the fact finding apparatus of a single court.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion
[HN2] The Religious Land Use and Institutionalized Persons Act, *42 U.S.C.S. § 2000cc* et seq., to enlarges rather than restricts the free exercise of religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN3] The government's decision to lift burdens on the free exercise of religion is not tantamount to government endorsement of either a particular religion or religion in general.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN4] Government action which operates to accommodate the exercise of religion is not tantamount, by itself, to an unconstitutional endorsement of religion.

Civil Procedure > Trials > Judicial Discretion
[HN5] It is a sound exercise of judicial discretion not to decide issues which are unnecessary to the outcome of the case.

COUNSEL: David Alan Goldberger, Ohio State University College of Law, Columbus, OH, for plaintiffs (C2-98-275).

Todd Robert Marti, Ohio Attorney General's Office, Columbus, OH, for defendants (C2-98-275).

JUDGES: Edmund A. Sargus Jr., United States District Judge. MAGISTRATE JUDGE KEMP. JUDGE GRAHAM.

OPINIONBY: Edmund A. Sargus Jr.

OPINION: [*829]

OPINION AND ORDER

These three cases, one pending before the undersigned Judge, one pending before Judge James L. Graham, and one pending before Magistrate Judge Terence P. Kemp, have been consolidated for the purpose of issuing a single ruling on defendants' motion to dismiss. The sole issue raised by the motion is the constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), *42 U.S.C. § § 2000cc* et seq.

In a Report and Recommendation filed on August 27, 2001, Magistrate Judge Kemp, to whom the motion had been referred for an initial decision pursuant to *28 U.S.C. § 636*(b), [**2] recommended that the defendants' motion be denied, with the exception of that portion directed to plaintiffs' claims under the Ohio Constitution. Defendants objected to that recommendation, continuing to argue that RLUIPA was not a constitutional exercise of Congress' power under either the Spending Clause or the Commerce Clause. All of the plaintiffs, including the United States, which intervened in order to defend the constitutionality of RLUIPA, filed responses to the objections, and the defendants filed a reply. For the following reasons, the objections will be overruled and defendants' motion for partial dismissal will be denied with the exception of that portion directed to plaintiffs' claims under the Ohio Constitution.

I.

The facts of this case are essentially those set forth in the Magistrate Judge's Report and Recommendation. Because, for the most part, defendants' challenge is a legal challenge and not dependent upon the facts of any particular case, a lengthy recitation of the facts is unnecessary. [*830] However, as more fully discussed below, there are certain facts which the defendants assert have been established for purposes of the Court's ruling and which, they claim, [**3] were overlooked or improperly disregarded by the Magistrate Judge. The Court will comment on those factual issues in the context of discussing the legal objections which defendants have raised.

Otherwise, the facts are relatively straightforward. Each of the plaintiffs claims to have been denied the right to practice his religion in the prison setting due to what plaintiffs assert are unwarranted concerns about security or unjustified assumptions about the relationship between plaintiffs' chosen religion and prison gang activity, primarily White Supremacy gangs. Although plaintiffs originally contended that their constitutional rights were being violated under the Turner v. Safley standard, see *Turner v. Safley, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*, after RLUIPA was enacted, they contended that the more restrictive standards set forth in that statute applied to the state's actions. The State of Ohio then sought a ruling from the court that RLUIPA is unconstitutional.

II.

Defendants challenged RLUIPA on grounds that its enactment exceeded Congress' powers under either the Spending Clause or the Commerce Clause of the United States Constitution. [**4] The Magistrate Judge determined that the Spending Power provided adequate support for the enactment of RLUIPA, and consequently did not reach the Commerce Clause issue. Defendants argued both that the Magistrate Judge's conclusions with respect to the Spending Clause are erroneous, and that the Magistrate Judge erred in refusing to reach the arguments relating to the Commerce Clause. For the following reasons, the Court finds each of defendants' objections to be without merit.

Defendants first argue that a statute such as RLUIPA which imposes a "least restrictive means" test on the actions of prison officials is too vague to be enforceable in the prison setting. Defendants argue that, although this test governs the actions of a state when dealing with private citizens' First Amendment concerns, it not only has the potential to lead to judicial second-guessing in the prison setting, but has, when applied in the past, produced judicial decisions diametrically opposed to each other, thus leaving prison officials without sufficient

guidance to determine how to implement RLUIPA's requirements.

The short answer to defendants' arguments is that any statute which contemplates judicial review [**5] under a standard which is not susceptible to mechanical and precise definition has the potential to lead to conflicting judicial decisions on similar sets of facts. This potential result is not fatal to the enforceability of the statute. The Court further believes that defendants' continued reliance on *Turner v. Safley, supra,* is unavailing. In Turner, the Supreme Court was interpreting a provision of the Constitution. In doing so, it weighed the constitutional rights of inmates against the realities of the prison setting. Although the Court did not conclude that the First Amendment required imposition of a "least restrictive means" test, Congress, in enacting RLUIPA, has decreed otherwise with respect to a narrow class of First Amendment claims. Once Congress makes that decision, it is the Court's duty to implement it unless the statute exceeds Congress' power or is otherwise unconstitutional. The fact that the Supreme Court did not impose such a high standard absent a congressional directive to do so is, by itself, not persuasive on the issue of whether Congress had the power to impose a higher standard if it so chose.

[*831] Defendants make several arguments which, [**6] they claim, should have been resolved by the Magistrate Judge on the basis of their "uncontroverted" affidavits. They contend that, as a factual matter, (1) there is an inadequate relationship between the federal funds provided and the purposes of RLUIPA; (2) that any such relationship is not proportional to the amount of federal funds utilized in the prison programs in Ohio; and (3) that the enforcement of RLUIPA in the prison setting will necessarily involve burdening other inmates by placing them at a greater risk of physical harm because RLUIPA will prevent prison officials from restricting activities of other prisoners which pose legitimate security threats. In response, plaintiffs argue primarily that these are all matters of "legislative" fact and that defendants in an individual case may not, by entering affidavits into the record, compel the Court to reach the conclusion that, for example, to enforce RLUIPA would necessarily burden other inmates. That is a judgment, according to plaintiffs, which Congress is free to make and which the Court may overturn only if it is irrational.

The Court agrees with plaintiffs on this issue. For the most part, defendants have raised a facial [**7] challenge to RLUIPA's constitutionality, and have not contended that under the facts of any of the specific cases pending before the Court, applying RLUIPA would produce unconstitutional results. [HN1] When evaluating a facial challenge to a statute, the Court must be careful not to allow the legislative findings underlying enactment of the statute to be "trumped by the fact finding apparatus of a single court." *Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1312 (4th Cir. 1995),* vacated on other grounds, *517 U.S. 1206 (1996),* reaffirmed *101 F.3d 325 (4th Cir. 1996),* cert. denied *520 U.S. 1204 (1997).* Beyond that fundamental point, however, the Court is persuaded that the United States has demonstrated an adequate relationship between the purpose of the federal funds and the purposes of RLUIPA, and that the four-part test set forth in *South Dakota v. Dole, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987)* has been satisfied here.

Defendants' reliance on *FCC v. League of Women Voters, 468 U.S. 364, 399-400, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984)* for its proportionality argument is [**8] also misplaced. Importantly, that case involved a Congressional enactment which, if validated, would have restricted the First Amendment free speech rights of the recipients of federal funds. In the context of a First Amendment challenge, the Court held that there must be a substantial relationship between the purpose of the funding and the interests sought to be advanced by the First Amendment restrictions. Otherwise, Congress could simply not "justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects." *Id. at 402.* By contrast, [HN2] Congress passed RLUIPA to enlarge rather than restrict the free exercise of religion, and the First Amendment concerns identified in League of Women Voters are not present here. Further, the radio stations at issue in that case were prohibited from spinning off affiliates to carry on the work which Congress had prohibited, so that it was impossible for them to carry out their free speech activities by segregating the Congressional funds from the entity which performed those activities.

As the plaintiffs contend, the state has, among other things, the recourse simply to choose not [**9] to accept federal funding. If the funding is, as defendants assert, a de minimis portion of the state prison budget, then Ohio has more incentive to forego federal funding of its prisons. Should it do so, the State would not be subject to [*832] RLUIPA under a Spending Clause theory. Since Ohio has continued to accept federal funds after RLUIPA's enactment, however, it has clearly not chosen this alternative.

Defendant's other primary argument is that RLUIPA constitutes governmental endorsement of religion. The Court adopts the Report and Recommendation's conclusion that [HN3] the government's decision to lift burdens on the free exercise of religion is not tantamount to government endorsement of either a particular religion or religion in general. The Supreme Court has specifically upheld government enactments in the free exercise area which allow religion to be exercised in a manner which

the First Amendment does not compel, and those enactments have been upheld as a valid exercise of Congress' power in this area. [HN4] Government action which operates to accommodate the exercise of religion is not tantamount, by itself, to an unconstitutional endorsement of religion. *Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, 483 U.S. 327, 337, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987).* [**10]

Finally, the Court agrees with the Magistrate Judge that there was no need to reach the Commerce Clause issue in this case. [HN5] It is a sound exercise of judicial discretion not to decide issues which are unnecessary to the outcome of the case. Because RLUIPA can be sustained on either of the two grounds advanced by the plaintiffs and the Court has found one of those grounds to be sufficient, any decision on the Commerce Clause issue would be an advisory opinion. Although the possibility exists that the Court of Appeals would disagree with this Court's analysis of the Spending Clause issue and might therefore be required to reach the Commerce Clause argument, that is not a justification for deciding a difficult constitutional issue when that decision is unnecessary to permit the case to proceed.

III.

Based upon the foregoing, the objections to the Magistrate Judge's Report and Recommendation are OVERRULED and the Report and Recommendation is ADOPTED. The defendants' motion to dismiss is DENIED with the exception that plaintiffs' claims asserted directly under the Ohio Constitution are DISMISSED. Case No. C-2-97-382 is returned to Judge Graham for further proceedings. Case No. C-2-95-517 will, [**11] unless objections are filed within ten days, be returned to Magistrate Judge Kemp for further proceedings on the assumption that the only issue which the non-consenting party, the United States, intended to argue was the constitutionality of RLUIPA, and that the parties do not have further objections to that case proceeding to adjudication on the merits before Magistrate Judge Kemp.

2-25-2002

Edmund A. Sargus Jr.

United States District Judge

John W. Gerhardt, Plaintiff, v. Alan Lazaroff, et al., Defendants, and Lee Hampton, et al., Plaintiffs, v. Reginald Wilkinson, et al., Defendants, and John Miller, et al., Plaintiffs, v. Reginald Wilkinson, et al., Defendants.

Case No. C2-95-517, Case No. C2-97-382, Case No. C2-98-275

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

221 F. Supp. 2d 827; 2001 U.S. Dist. LEXIS 24489

August 27, 2001, Decided
August 27, 2001, Filed

SUBSEQUENT HISTORY: adopted, objection overruled, dismissed, in part, *Gerhardt v. Lazaroff, 2002 U.S. Dist. LEXIS 16205* (S.D. Ohio Feb. 25, 2002) Reported at: *221 F. Supp. 2d 827 at 832.*

DISPOSITION: [**1] Recommended that motions to dismiss plaintiffs' RLUIPA claims be denied.

CASE SUMMARY:

PROCEDURAL POSTURE: In consolidated cases, plaintiff state prisoners sued defendant prison officials, alleging, inter alia, that the state prison's practices regarding the prisoners' religious practices violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), *42 U.S.C.S. § 2000cc* et seq. The prison officials moved to dismiss the RLUIPA claim. The matter was referred to a magistrate for a report and recommendation.

OVERVIEW: The RLUIPA was a proper exercise of congressional spending power as it furthered the general welfare and adequately expressed an intent to condition further payment of federal funds to state prison programs upon the states' compliance with RLUIPA. The relationship between federal funds received by the state prison and the prisoners' religious practices was sufficiently direct to insulate the RLUIPA from a constitutional challenge based on funding relationships given the discretion granted Congress to determine the need to enact specific legislation to further the general welfare and the precept that otherwise properly enacted legislation was struck down only if it clearly exceeded constitutional limits on U.S. Const. art. I power. The RLUIPA did not violate the Establishment Clause as it specifically permitted safety and security to outweigh claims for religious accommodation. The Act did not violate the state's Tenth Amendment rights as Congress acted constitutionally under the Spending Clause in enacting the RLUIPA. The Act did not violate the Eleventh Amendment because by accepting federal funds, the state acquiesced to enforcement under *42 U.S.C.S. § 2000cc-5*(4)(A).

OUTCOME: The magistrate recommended that the court find the Religious Land Use and Institutionalized Persons Act of 2000, to be a constitutional exercise of congressional spending power and that neither the Tenth Amendment nor the Eleventh Amendment provided the prison officials with immunity from the Act's provisions. Consequently, the magistrate recommended that the motion to dismiss be denied.

LexisNexis(R) Headnotes

Governments > Legislation > Enactment
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation
[HN1] It follows from the constitutionally-mandated division of authority among the three branches of the federal government, as well as from the division of governmental power between the federal government and the states, that Congressional acts are valid only when effectuated through one or more specifically enumerated constitutional powers. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the United States Constitution is written. However, an act of Congress is presumptively constitutional and should only be invalidated when it is clear Congress exceeded its enumerated powers in passing such legislation.

Constitutional Law > Congressional Duties & Powers > Commerce Clause
[HN2] Congress may constitutionally regulate three main areas or activities of commerce. First, Congress may regulate the channels of interstate commerce. Second, Congress may regulate to protect the instrumentalities of interstate commerce, or persons or things involved in interstate commerce, even though the threat being regulated against arises from intrastate activities. Finally, Congress may regulate activities which have a substantial effect on interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause
[HN3] In order for a statute constitutionally to regulate activities which have a substantial effect on interstate commerce, one of three prerequisites must be satisfied: (1) the relationship between the regulated activities and interstate commerce must be readily apparent; (2) Congress must have made specific and supportable factual findings concerning that relationship; or (3) the statute must place the burden on the party seeking enforcement to allege and demonstrate that relationship.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN4] The United States Constitution explicitly empowers Congress to provide for the general welfare of the United States. U.S. Const. art. I, § 8, cl. 1. Congress may expend funds in areas or enterprises even though its constitutional power to legislate that area or enterprise may be limited: the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the United States Constitution. In making such expenditures, however, Congress may constitutionally condition receipt of federal funds upon compliance by the recipient with federal statutory and administrative directives by the states to further broad policy objectives Congress might not otherwise be able to effect through direct legislation. Despite this broad assertion, Congress' spending power has never has never been viewed as unlimited. There are four broad constitutional circumscriptions of the spending power.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN5] The first limitation on the spending power of Congress is derived from the language of the spending clause itself. U.S. Const., art. I, § 8, cl. 1. An exercise of the spending power is permissible only when it is in the pursuit of the general welfare of the United States. The second limitation requires that any conditions on the federal grant be clearly presented to the states for their acceptance or rejection along with the grant itself. The third requirement is that the conditions on the federal grant be related to the federal interest involved in the various national projects or programs. The last requirement is that Congress's exercise of its spending power not violate any other constitutional provision.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN6] A determination of what constitutes the general welfare of the citizens under U.S. Const. art. I, § 8, cl. 1, is left to Congress's discretion unless the choice is clearly wrong or a display of arbitrary power rather than an exercise of judgment. The concept of the general welfare is not static, and needs that were narrow or parochial a century ago may be interwoven in the present day with the well-being of the nation.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN7] According to a magistrate of the United States District Court for the Southern District of Ohio, Eastern Division, the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., is sufficiently related to the general welfare of the United States to survive a constitutional challenge on that ground. U.S. Const. art. I, § 8, cl. 1.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN8] The second requirement of the spending power under U.S. Const. art. I, § 8, cl. 1, actually encompasses the consideration of two interrelated constitutional concerns. First, any condition imposed by Congress on the receipt of federal funds must be unambiguous so that states may exercise their choice knowingly, cognizant of the consequences of their participation. Thus, a state must be able to ascertain what is expected of it by the language of the statute. Consequently, the conditions must be articulated in a way that allows a state to be certain of the consequences of its obligation to enforce the requirement. Second, such conditions may not be imposed on the states after the funds have been received. Though Congress's power to legislate under the spending power is broad, it does not include surprising participating states with post acceptance or retroactive conditions.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN9] According to a magistrate for the United States District Court for the Southern District of Ohio, Eastern Division, the term "shall" is quintessentially a word as-

sociated with obligations and rights for purposes of cases challenging a statute under U.S. Const. art. I, § 8, cl. 1.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN10] A magistrate for the United States District Court for the Southern District of Ohio, Eastern Division, holds that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), *42 U.S.C.S. § 2000cc* et seq., adequately expresses Congress's intent to condition further payment of federal funds to state prison programs upon the states' compliance with RLUIPA for purposes of U.S. Const. art. I, § 8, cl. 1.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN11] A magistrate for the United States District Court for the Southern District of Ohio, Eastern Division, concludes that the strict scrutiny standard set forth in the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., is not so vague for purposes of U.S. Const. art. I, § 8, cl. 1, that states cannot reasonably appreciate the obligations they are choosing to undertake by continuing to accept federal money for prison programs.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN12] Given the discretion granted to Congress to determine, in the first instance, the need to enact specific legislation to further the general welfare, and the precept that courts may strike down otherwise properly-enacted federal legislation only if it clearly exceeds constitutional limits on the U.S. Const. art. I power, a magistrate of the United States District Court for the Southern District of Ohio, Eastern Division, concludes that the relationship between federal funds received by a state prison and the religious practices of inmates confined in institutions under the jurisdiction of the state prison is sufficiently direct to insulate the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., from this particular constitutional challenge.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN13] A magistrate of the United States District Court for the Southern District of Ohio, Eastern Division, concludes that the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., does not violate the First Amendment's Establishment Clause.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN14] The Establishment Clause of the United States Constitution provides that Congress shall make no law respecting an establishment of religion. U.S. Const. amend. I. The Lemon test remains the current standard by which to determine whether a statute violates the Establishment Clause. To pass constitutional muster, the statute in question (1) must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) the statute must not foster an excessive government entanglement with religion.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN15] Governments may, in their effort to accommodate religion, go beyond what is minimally required of them by the Free Exercise Clause without running afoul of the Establishment Clause. The government is permitted, under the Lemon test, to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions so long as the government does not abandon neutrality and act with the intent of promoting a particular point of view in religious matters. The notion that any law which makes it easier for a religion to carry out its mission is unconstitutional is rejected since religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster, such as laws which provide tax exemptions to religious organizations or which permit school supplies to be loaned to students attending parochial schools. What is prohibited is the government itself advancing religion through its own activities and influence. Finally, the notion that a law which singles out religions for the benefit it confers is per se unconstitutional is rejected. Where the government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, there is no reason to require that the exemption come packaged with benefits to secular entities.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
[HN16] The Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., specifically permits safety and security, which are undisputedly compelling state interests, to outweigh an inmate's claim to a religious accommodation so long as there is a sufficient nexus between that interest and the denial of the requested accommodation, and there is no reasonable alternative to denial that would accommodate both the free exercise of religion and the need to maintain order in the prison environment.

Constitutional Law > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
[HN17] According to a magistrate of the United States District Court for the Southern District of Ohio, Eastern Division, at a minimum, the constitutional infirmity of a statute under the Establishment Clause flows from consequences that are evident or on the face of the statute and which, due to the absolute nature of the statute's requirements, cannot be avoided by any amount of statutory interpretation. Where it is an open question as to the extent of the burdens (if any) the statute will necessarily place on third parties and where the courts will be given the chance to interpret the statute's requirements in order to avoid placing unconstitutional burdens on others in order to accommodate the free exercise of religion, the statute will withstand an Establishment Clause challenge.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
[HN18] The potential loss of less than one percent of the funding by the states does not cross the generalized line established by prior cases and turn enticement into compulsion for purposes of U.S. Const. art. I, § 8, cl. 1.

Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN19] See U.S. Const. amend. X.

Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN20] The Tenth Amendment has long been interpreted to ensure that the federal government remains one of limited powers, determining what powers in fact have been given to it by the people.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN21] The Tenth Amendment stands as no independent constitutional bar to legislation that is a constitutional exercise of the spending power.

Constitutional Law > State Autonomy
[HN22] The scope of the state's sovereign immunity neither derives from nor is limited by the terms of the Eleventh Amendment. The United States Constitution does not give Congress the power to waive a state's sovereign immunity from suit in its own courts.

Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN23] The determination of whether a particular statute violates the Tenth Amendment is necessarily a determination of whether Congress was within its enumerated powers in passing the contested legislation. Congress exercises its conferred powers subject to the limitations contained in the United States Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the federal government is subject to limits that may, in a given instance, reserve power to the states. The Tenth Amendment thus directs the court to determine whether an incident of state sovereignty is protected by a limitation on a U.S. Const. art. I power.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Reserved Powers
[HN24] According to a magistrate for the United States District Court for the Southern District of Ohio, Eastern Division, because Congress acted constitutionally under the Spending Clause in passing the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., the states' Tenth Amendment rights necessarily have not been violated.

Constitutional Law > State Autonomy
[HN25] The Eleventh Amendment provides that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. U.S. Const. amend. XI.

Constitutional Law > State Autonomy
[HN26] Although the text of the Eleventh Amendment creates no immunity against citizens attempting to sue their own state, it has long been settled that the Amendment, representing the concept of states as co-equal sovereigns with the federal system bars such suits. Furthermore, suits which raise civil claims against state officials for actions committed while serving in their official capacity but are, in essence, a claim against the state are barred by the Eleventh Amendment.

Constitutional Law > State Autonomy

[HN27] Although Congress has the power to abrogate a state's Eleventh Amendment immunity pursuant to U.S. Const. amend. XIV, § 5, Congress may not abrogate state sovereign immunity under any of its U.S. Const. art. I powers.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

[HN28] Congress may, in the exercise of its spending power, condition the grant of funds to the states upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment & Prisoner Rights
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Constitutional Law > State Autonomy

[HN29] For purposes of the Eleventh Amendment, a state's acceptance of the terms pursuant to the Spending Clause necessarily establishes its acquiescence to § 2(a) of the Religious Land Use and Institutionalized Persons Act of 2000, *42 U.S.C.S. § 2000cc* et seq., which provides that a person may assert a violation of the Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government, where the term government includes a state, its departments, or its officials. *42 U.S.C.S. § 2000cc-5*(4)(A).

Constitutional Law > State Autonomy

[HN30] The Ex parte Young doctrine remains good law in providing that plaintiffs may bring a suit against a state official seeking prospective injunctive or declaratory relief to conform their behavior to comply with federal law without running afoul of the Eleventh Amendment.

Constitutional Law > State Autonomy

[HN31] The Eleventh Amendment clearly does not now prohibit prisoners from utilizing the Ex parte Young doctrine to obtain accommodations for their religious practices.

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JUDGES: Terence P. Kemp, United States Magistrate Judge. JUDGE GRAHAM. MAGISTRATE JUDGE ABEL. JUDGE SARGUS.

OPINIONBY: Terence P. Kemp

OPINION:

[*832] REPORT AND RECOMMENDATION

Plaintiffs in these consolidated cases are Ohio prisoners who desire to practice a religion not traditionally recognized by the Ohio Department of Rehabilitation and Corrections ("ODRC"). All plaintiffs advance similar claims that ODRC staff have interfered with the practice of their respective religions or that staff have subjected them to illegal or unconstitutional treatment because they attempted to assert their religious beliefs. These allegations include: (1) denial of access to religious literature and/ or items necessary to practice their religion; (2) denial of the opportunity to conduct religious services; (3) denial of the freedom to conform their dress or appearance to that required by [*833] their religion; (4) denial of a prison chaplain specifically [**2] trained in and dedicated to their religion; and (5) retaliation and discrimination by ODRC staff resulting from attempts to advance and practice their religion. All have amended their complaints to assert that ODRC's practices violate the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), *42 U.S.C. § § 2000cc* et seq.

The defendants have moved to dismiss the RLUIPA claims, arguing that the statute may not be constitutionally applied to the States. The United States has intervened to defend the constitutionality of RLUIPA. Although the motions to dismiss filed in cases C-2-95-517 and C-2-98-275 were originally to have been decided by the undersigned in a final decision, as authorized by *28 U.S.C. § 636*(c), the United States did not consent to that disposition. Thus, this Report and Recommendation is being issued pursuant to *28 U.S.C. § 636*(b)(1)(B) and Eastern Division Order 95-2. For the following reasons, it will be recommended that the motions to dismiss plaintiffs' RLUIPA claims be denied.

I.

Although the defendants styled their motion as one to dismiss, both they and the plaintiffs [**3] have submitted evidentiary materials outside the pleadings. There are disputes about the admissibility of some of this material. The Court's dispostion of the motion is not primarily fact-based, and it moots the parties' dispute about evidentiary materials. The Court will set forth only those facts necessary to put the legal issues into context. Most, if not all, of the facts recited below are not disputed and many have been stipulated.

A. Current Plaintiffs and Ohio's Experience Under RFRA

In Gerhardt, Case No. C2-95-517, the plaintiff is a member and ordained minister of the Church of Jesus Christ Christian ("CJCC"), a subdenomination of the Christian Identity movement. This church espouses theory contrary to more traditional Christian dogma, including a belief that the races should be separated, and seeks to advance these beliefs through the Aryan Nation, the church's political division. In Miller, Case No. C2-98-275, members of the plaintiff class are followers of the Asatru religion, also known as Odinism, Vor Tru, or Troth. This polytheistic religion of Northern Europe originated with the Vikings and includes Thor, the Norse God of Thunder, among its pantheon of [**4] gods. Finally, in Hampton, Case No. C2-97-382, plaintiff J. Lee Hampton is a member of the Wiccan religion and a practicing "witch," while plaintiff Jon B. Cutter is an avowed Satanist. For purposes of the instant motion, defendants concede that these are *bona fide* religions and that the plaintiffs do genuinely hold these beliefs. It is also undisputed that the defendants have refused to grant some or all of the religious requests made by the plaintiffs.

The defendants assert that the denial of many of the plaintiffs' requests was justified because the practices and/ or articles in question pose a security risk to the institution, either by advancing inflammatory practices or ideologies tending to incite violence or by sheltering otherwise illicit gang activity. For example, defendants claim that the practice of Asatru has been tied to the 1993 riot at the Southern Ohio Correctional Facility, as well as various murders, escapes, or attempted escapes at the Madison, Trumbull, Lebanon, and Mansfield Correctional Institutions. Similarly, the defendants contend that the CJCC is affiliated with the Aryan Brotherhood, a group allegedly involved in criminal activity and violence [**5] within the Ohio prison system. Both groups are allegedly linked to white supremacist activities and violent crime in the public at large. Plaintiffs, [*834] however, deny that their respective religions are involved with any violent activity, condone or espouse any act of violence, or pose any security threat to the various correctional institutions of the Ohio prison system. Although both parties discuss these issues in their memoranda, the Court is not required to determine, in the context of the pending motions to dismiss, the relationship, if any, between plaintiffs' religious beliefs and prison security. Rather, the issue is whether defendants must meet RLUIPA's higher standard of justifying security-based restrictions on religion, or only the lower pre-RLUIPA standard.

The defendants also detail the allegedly onerous effects that Congress' last effort to legislate a higher standard of scrutiny to evaluate prisons' efforts to regulate inmates' religious practices - the Religious Freedom Restoration Act, or RFRA - imposed upon ODRC operations and staff before its application to the States was declared unconstitutional in *Boerne v. Flores, 521 U.S. 507 (1993)*. According [**6] to defendants, the number of religions espoused by Ohio prisoners proliferated under RFRA, and the religions in question often demanded distinctly unorthodox religious services and items, such as martial arts classes. Furthermore, a considerable amount of state resources were consumed addressing prisoner litigation efforts. According to defendants, ODRC religious administrators were spending between 75 and 90 percent of their time addressing RFRA litigation and operational issues, forcing them to neglect their other religious duties. In one case alone, ODRC and Ohio Department of Youth Services employees spent more than 125 hours in connection with depositions and more than 900 hours responding to over 300 separate document requests. More than 70 cases involving RFRA were active during this same time period. The significance, if any, of these matters to the constitutionality of RLUIPA will be addressed below.

B. History and Enactment of RLUIPA

In 1993, in response to the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*, Congress enacted the Religious Freedom Restoration [**7] Act ("RFRA"), *42 U.S.C. 2000bb* et seq. pursuant to either its Enforcement Power or Preventive Power under § 5 of the Fourteenth Amendment. In Smith, the Supreme Court held that a law of general applicability, such as Oregon's law precluding employees who were terminated for "good cause" from receiving unemployment benefits, need not be supported by a "compelling state interest" in order to pass constitutional muster. RFRA outlawed governmental attempts to "substantially burden" any person's exercise of religion, "even if the burden results from a rule of general applicability," unless the law furthered a compelling state interest and was the least restrictive means of furthering that interest. The Supreme Court, however, held in Boerne that this legislative attempt by Congress exceeded its power to legislate under Section 5 of the Fourteenth Amendment, and that the statute was therefore unconstitutional as applied to the States. *Boerne, 521 U.S. at 536.*

Congress subsequently attempted to enact similar or identical statutes pursuant to other enumerated powers. The first bills, S. 2148 and H.R. 4019 (105th Congress) (entitled the [**8] Religious Liberty Protection Acts), apparently died of neglect during the Clinton impeachment proceedings and failed to move out of committee in either House of Congress. The 1999 versions, S. 2081 and H.R. 1691 (106th Congress), passed the House but failed to clear the Senate, drawing substantial opposition [*835] from various civil rights groups who feared the proposed legislation would undermine various anti-discrimination laws.

The following year, after considering testimony about the difficulties that various institutionalized individuals experienced in practicing their faith, the Senate passed a bill limiting the applicability of the proposed legislation to state actions affecting land use and the institutionalized. As it relates to institutionalized persons, the Act contains a textual provision virtually identical to RFRA, but premises its authority on the spending and commerce powers entrusted to Congress under the Constitution. Thus, it prohibits governments from imposing, for any but compelling reasons, substantial burdens on the religious exercise of institutionalized persons if those burdens are "imposed in a program or activity that receives Federal financial assistance, or [**9] if the burden affects interstate or foreign commerce or commerce with Indian tribes." *42 U.S.C. § 2000cc-1*(b). Furthermore, although it provides judicial remedies for unnecessary restrictions on religious liberty, Congress specifically noted that it expected the federal courts, when considering potential claims of the institutionalized, to "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with consideration of costs and limited resources." Joint Statement, 146 Cong. Rec. at S7775. Senate Bill S. 2869 (106th Congress) was not considered by committee but was passed on July 27, 2000 after only 47 minutes of debate. It was transmitted to the House that same evening and was passed, again without committee consideration, 16 minutes later. With President Clinton's signature, the bill became law effective September 22, 2000 and is codified at *42 U.S.C. § 2000cc* et seq.

C. ODRC Funding and Operations

Because RLUIPA was passed by Congress as an exercise [**10] of its Commerce and/ or Spending Power, the parties have submitted evidence relating to (1) the degree to which the ODRC receives federal financial support and the source of any such funds, and (2) the extent to which the ODRC conducts activities which may be construed to constitute interstate commerce. See Joint Stipulation, C2-97-382 File doc # 93, C2-95-517 File doc. # 106. The Joint Stipulation has been supplemented by a subsequent affidavit filed by Horst Gienapp, Grants Administrator for the ODRC. (C2-98-275 File doc. # 190). The pertinent facts are as follows.

1. Federal Funding of ODRC

Congress regularly provides grants to the ODRC to achieve a number of different objectives, either as direct grants from a federal agency to the ODRC or as federal funds generally allocated to other Ohio departments which are subsequently transferred to the ODRC. The purpose of any given grant is usually gleaned from one of two sources: the Catalog of Federal Domestic Assistance, jointly published by the United States General Services Administration, the Executive Office of the President, and the Office of Management and Budget, or by an individualized statement accompanying the grant [**11] articulating what aspect of ODRC operations the particular federal agency is intending to fund. As of September 22, 2000, the effective date of RLUIPA, the ODRC apparently had received 22 different federal grants. Second Affidavit of Horst Gienapp at 2.

Of these 22 grants, some are directed to support generalized construction, research, and operational efforts of the ODRC and, as a result, are not given or expended directly to fund specific prison inmate programs. Two of the largest of such grants are the Violent Offender Incarceration and [*836] Truth In Sentencing Incentive Grants ("VOI/ TIS") and the State Criminal Alien Assistance Program ("SCAAP"). The former, provided by the United States Department of Justice, is intended to provide states with funds to build or expand violent offender confinement capacity. Ohio has received approximately $ 69,000,000 over the last three years under the program; over $ 12,000,000 was applied for and awarded for the current year but has not yet been received. The latter program reimburses the ODRC for costs it incurs to incarcerate aliens convicted of felonies in Ohio. Under this program, Ohio traditionally receives an annual award of approximately [**12] $ 1,000,000. It received $ 1,300,000 last year. The most recent application for funds under this program is still pending. Similar federal funding efforts are intended to create and maintain support programs for ODRC staff, such as stress management programs. A second broad category of federal grants are specifically allocated to support prisoner education, vocational training and assistance, and drug treatment programs. A third and final broad category of grants go directly to support prisoner subsistence. These include monthly grants under the Federal School Breakfast Program and the Federal School Lunch Program, currently totaling more than $ 1,200,000.

Federal grant programs generally require the ODRC to submit applications for these various grants. This procedure, pending Congressional continuation of the programs and approval of the ODRC's request, involves a delay between request for and receipt of the relevant funds. Although the ODRC made applications for and was awarded federal grants after September 22, 2000, as of the date of the stipulation it had not received any funds pursuant to applications made after RLUIPA's effective date. The ODRC, however, expects to continue [**13] to apply for funds under these programs and, assuming continued Congressional support, expects to receive such funds. It may have done so by the date of this Report and Recommendation.

2. ODRC's Relationship with Interstate Commerce

The ODRC has established business agreements and regularly conducts transactions in intrastate and interstate commerce. The ODRC operates a program entitled Ohio Prison Industries ("OPI") in which inmates produce goods and services, some of which are sold to buyers outside the ODRC. Often using raw materials produced outside of Ohio, Ohio inmates produce products such as shoes, beds, furniture, and mulch for the state of Ohio. Although the state agencies generally pay the ODRC for these goods, they do so at a cost allowing the state to recognize substantial savings. For example, Ohio achieves savings of approximately $ 1,000,000 annually by purchasing highway safety reflectors produced and/ or recycled by OPI. The ODRC also sells some of these products to departments of corrections in other states. The ODRC has provided computer data-entry services to Unibase, a Utah Corporation, under a program maintained since 1987. Approximately 80 to 100 inmates [**14] at the Lebanon Correctional Institution and 50 inmates at the London Correctional Institution currently participate in the program. An additional 50 inmates at the Ohio Reformatory for Women are expected to enter the program shortly. Inmates also provide various services to Ohio departments, such as attaching snowplows and salt spreaders to state vehicles, and the ODRC is paid for these services.

Like any institution, the ODRC engages in commerce by acquiring the goods and services it requires to operate. Although each ODRC institution is largely responsible for its own purchasing, [*837] some expenditures in interstate commerce may be generalized among the state's correctional facilities. For example, Orient Correctional Institution's ("OCI") regular purchase of computers and motor vehicles, including two such vehicles last year, is representative of purchasing at the other institutions. Although OCI and Pickaway Correctional Institution ("PCI"), as the location of Frasier Medical Center, incur somewhat disproportionate medical expenses (amounting to approximately $ 2,000,000 annually, with an additional $ 20,000 to $ 60,000 spent monthly on mental health medications), all of the ODRC's [**15] facilities purchase a substantial amount of medical supplies and pharmaceuticals in interstate commerce. Ameritech and Quest, both non-Ohio companies, are paid approximately $ 1,800 and $ 500 per month, respectively, for providing ODRC facilities with local and long-distance telephone service. ODRC also enjoys an exclusive contract with MCI, an interstate corporation, by which it receives a percentage of the revenue attributable to the collect calls placed by the prison population to locations inside and outside of Ohio. The ODRC also engages outside corporations to manage Ohio prisons. Management and Training Corporation, a Utah corporation, is paid a per diem of $ 36.40 to operate the 1380 beds at the Lake Erie Correctional Institution in Conneaut, while CiviGenics Corporation, a Massachusetts corporation, is paid $ 55.39 a day to operate the 552 beds at the North Coast Correctional Treatment Facility in Grafton. No plaintiff in the instant action, however, has been incarcerated at either of those two facilities.

Finally, the ODRC enjoys interstate relationships and engagements providing for the housing and subsequent evaluation of its prison population. Ohio is a member of an interstate [**16] corrections compact, pursuant to *O.R.C. § 5120.50*, which provides for agreements between Ohio and twenty other states to exchange and house prisoners on a reciprocal basis, and Ohio currently houses and exchanges prisoners under the program. A similar agreement with the Federal Board of Prisons currently provides for reciprocal housing of state and federal prisoners, and prisoners are currently incarcerated under this program. Finally, Ohio enjoys cooperative arrangements with other states involving the evaluation and monitoring of prisoners currently released on probation or parole, and thousands of such individuals are involved in these programs annually. The plaintiffs do not contend that these compacts and agreements substantially burden their ability to exercise their religion.

II.

One of plaintiffs' claims is that ODRC's actions violate the Ohio Constitution. Defendants have moved to dismiss these claims on Eleventh Amendment grounds and under *O.R.C. § 9.86*. Plaintiffs' memorandum does not offer any response to these arguments. Because it appears that plaintiffs do not oppose the dismissal of their Ohio constitutional claims, it will be recommended that defendants' motion [**17] be granted as to these claims.

III.

A. Introduction

After the parties fully briefed the constitutionality of RLUIPA as an issue of first impression, the United States District Court for the Eastern District of California, in *Mayweathers v. Terhune, 2001 U.S. Dist. LEXIS 22300, 2001 WL 804140* (July 2, 2001), rejected the same constitutional challenges raised by the defendants here. This Court is in full agreement with the result reached in Mayweathers, at least to the extent that it addresses the same issues decided in this Report and Recommendation, but because these issues have not been addressed by [*838] any other courts, this Court's analysis of the Spending Clause issue will be somewhat more detailed.

Additionally, plaintiffs have raised an issue about the ripeness of the defendants' motion. They argue that

the issue of RLUIPA's constitutionality is not ripe for decision because if defendants can demonstrate "that the plaintiffs' religious claims are merely a 'cover' for gang activities, ... this Court can decide this case on non-statutory and non-constitutional grounds." Plaintiffs' Joint Reply, at 12.

Apparently, plaintiffs' position is that if a claim asserted in a complaint may [**18] eventually turn out to be factually unsupported, the Court should defer a decision on the legal sufficiency of the claim until the facts can be evaluated either through a summary judgment motion or at trial. To do so would be to deprive a defendant of the right to have a claim's legal sufficiency tested by way of a motion to dismiss, and would force a defendant to litigate the claim even if the facts alleged by the plaintiff would not support recovery. That is why *Fed.R.Civ.P. 12(b)(6)* allows motions to dismiss, and also why plaintiffs have not advanced a valid reason to delay a decision on defendants' motion.

B. General Principles

Envisioning a government where the legislature would be but one of three co-equal branches, the Framers established limits on congressional legislative power "in order to ensure protection of our fundamental liberties." *Gregory v. Ashcroft, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)* (quoting *Atascadero State Hospital v. Scanlon, 473 U.S. 234, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)* (internal quotation marks omitted)). [HN1] It follows from the constitutionally-mandated division of authority among [**19] the three branches of the federal government, as well as from the division of governmental power between the federal government and the states, that Congressional acts are valid only when effectuated through one or more specifically enumerated Constitutional powers. "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)*. However, an act of Congress is presumptively constitutional and should only be invalidated when it is clear Congress exceeded its enumerated powers in passing such legislation. *United States v. Morrison, 529 U.S. 598, 607, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000); United States v. Harris, 106 U.S. 629, 635, 27 L. Ed. 290, 1 S. Ct. 601, 4 Ky. L. Rptr. 739 (1883)*. The Court must therefore determine whether Congress exceeded its Commerce Clause and/ or Spending Clause powers in enacting RLUIPA.

C. Commerce Clause

Congress asserted that it enacted RLUIPA pursuant to its Commerce Clause power, see *42 U.S.C. § 2000cc-1*(b)(2), and plaintiffs contend that [**20] such effort was constitutional. Defendants, however, contend that the statute, as written and as applied to the ODRC's regulation of inmates' religious exercise, exceeds Congress's powers under the Commerce Clause.

The Commerce Clause issue in this case is fairly narrow. [HN2] Congress may constitutionally regulate three main areas or activities of "commerce." First, Congress may regulate the channels of interstate commerce. See *United States v. Lopez, 514 U.S. 549, 558, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256-257, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1965)*. Second, Congress may regulate to protect the instrumentalities of interstate commerce, or persons or things involved in interstate commerce, even though the threat being regulated against arises from [*839] intrastate activities. *Lopez, 514 U.S. at 558; Perez v. United States, 402 U.S. 146, 150, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)*. Finally, Congress may regulate activities which have a "substantial effect" on interstate commerce. *Lopez, 514 U.S. at 558-559; Morrison, 529 U.S. at 608-609*. [**21] Plaintiffs concede that Congress enacted RLUIPA as an example of this last class of activities, seeking to remove substantial burdens on religious practices by prisoners which "affect" commerce. *42 U.S.C. § 2000cc-1*(b)(2).

[HN3] In order for a statute constitutionally to regulate activities which have a substantial effect on interstate commerce, one of three prerequisites must be satisfied: (1) the relationship between the regulated activities and interstate commerce must be readily apparent; (2) Congress must have made specific and supportable factual findings concerning that relationship; or (3) the statute must place the burden on the party seeking enforcement to allege and demonstrate that relationship. See *Lopez, supra; Harrison, supra;* see also *United States v. Riddle, 249 F.3d 529, 536 (6th Cir. 2001)*. The parties' briefs focus on the third prerequisite, and raise issues both about the sufficiency of the statutory language and the likelihood that ODRC's limitations on inmates' religious exercise could ever be shown to have a substantial effect on interstate commerce.

Congress also enacted RLUIPA pursuant to its [**22] authority under the Spending Clause. In the Court's view, the Commerce Clause issues are the more difficult, requiring substantial construction of the statutory language and raising serious questions about the relationship between the internal operation of state prisons and interstate commerce. Because RLUIPA can be found to be constitutional if it was a valid exercise of Congress' authority under either the Spending Clause *or* the Commerce Clause, the undersigned will forego further discussion of the Commerce Clause as being unnecessary to the Court's resolution of defendants' motion to dismiss.

D. Spending Clause

[HN4] The Constitution also explicitly empowers Congress to "provide for the ... general Welfare of the United States." U.S. CONST. Art. I, § 8, cl. 1. The Supreme Court has long made clear that Congress may expend funds in areas or enterprises even though its constitutional power to legislate that area or enterprise may be limited: "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *United States v. Butler, 297 U.S. 1, 66, 80 L. Ed. 477, 56 S. Ct. 312, 4 Ohio Op. 401 (1936)*. [**23] In making such expenditures, however, Congress may constitutionally condition receipt of federal funds "upon compliance by the recipient with federal statutory and administrative directives" by the states "to further broad policy objectives" Congress might not otherwise be able to effect through direct legislation. *Fullilove v. Klutznick, 448 U.S. 448, 474, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)*(Burger, C.J.); see also *South Dakota v. Dole, 483 U.S. 203, 206-207, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16-17, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)*. Despite this broad assertion, Congress' spending power has never has never been viewed as unlimited. The Supreme Court has identified four broad constitutional circumscriptions of the spending power. See, e.g., *Dole, 483 U.S. at 207; Pennhurst, 451 U.S. at 17*.

[HN5] The first limitation on this power is derived from the language of the spending clause itself. See U.S. CONST., Art. I, § 8, cl. 1. An exercise of the Spending [*840] Power is permissible only when it is in the pursuit of "the ... general [**24] Welfare of the United States." *Dole, 483 U.S. at 207;* see also *Helvering v. Davis, 301 U.S. 619, 640-641, 81 L. Ed. 1307, 57 S. Ct. 904 (1937); Butler, 297 U.S. at 65*. The second limitation requires that any conditions on the federal grant be clearly presented to the States for their acceptance or rejection along with the grant itself. *Dole, 483 U.S. at 207*. The third requirement is that the conditions on the federal grant be related to the federal interest involved in the various national projects or programs. *New York v. United States, 505 U.S. 144, 167, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992); Dole, 483 U.S. at 207-208*. The last requirement is that Congress' exercise of its Spending Power not violate any other constitutional provision. *Dole, 483 U.S. at 208*. The Court will separately discuss each of these four limitations in light of defendants' argument that RLUIPA represents an unconstitutional exercise of Congress' Spending Power.

1. Pursuit of the General Welfare

Defendants do not seriously contend that RLUIPA does not further the general welfare of [**25] the United States. The Supreme Court has recognized that [HN6] a determination of what constitutes the "general welfare" of the citizens is left to Congress' discretion "unless the choice is clearly wrong [or] a display of arbitrary power [rather than] an exercise of judgment." *Helvering, 301 U.S. at 640*. The concept of the general welfare is not static, and "needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation." *Id., at 641*. Recent decisions have recognized that "the level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." *Dole, 483 U.S. at 207 n. 2*, citing *Buckley v. Valeo, 424 U.S. 1, 90-91, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)* (per curiam). Consequently, [HN7] the Court holds that RLUIPA is sufficiently related to the general welfare of the United States to survive a constitutional challenge on that ground.

2. Timely and Unambiguous Statement of Conditions.

Although presented in Dole as a single element of the four-point test, [HN8] the [**26] second requirement actually encompasses the consideration of two interrelated constitutional concerns. First, any condition imposed by Congress on the receipt of federal funds must be "unambiguous" so that "states [may] exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst, 451 U.S. at 17;* see also *Dole, 483 U.S. at 207*. Thus, a state must be able "to ascertain what is expected of it" by the language of the statute. *Pennhurst, 451 U.S. at 17*. Consequently, the conditions must be articulated in a way that allows a state to be certain of the consequences of its obligation to enforce the requirement. Second, such conditions may not be imposed on the states after the funds have been received. "Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions." *Pennhurst, 451 U.S. at 25*. Defendants contend that the application of RLUIPA in this case offends the Constitution on both grounds and, as a result, the second prong of the Dole test cannot be met.

Taking these [**27] issues in reverse order, the Court turns first to the retroactivity issue. [*841] Both plaintiffs and the United States concede that RLUIPA was not intended to apply to federal funds disbursed prior to its effective date and that it could not constitutionally do so. However, the plaintiffs are seeking only prospective relief under RLUIPA. Defendants have stipulated that, after RLUIPA's effective date, and even after plaintiffs amended their complaint to include a claim under RLUIPA, they made additional applications

for federal funds. Although, at the time the parties entered into their stipulations, defendants had not actually received any funds pursuant to their post-RLUIPA applications, defendants acknowledged that they expected to receive such funds as early as August, 2001, the month in which this Report and Recommendation is being issued, and that they will continue their long-standing practice of applying for and receiving federal funds as this lawsuit progresses. Consequently, this case clearly presents the question of whether Congress intended to condition the receipt of those funds applied for and disbursed after September 22, 2000 upon compliance with RLUIPA, and whether it did [**28] so in a constitutional manner. In short, no retroactivity issue is raised by the facts of this case.

The more serious issue raised by defendants' motion is whether the first prong of the "notice" criterion has been satisfied. Defendants present two arguments: (1) that RLUIPA's language is not sufficiently clear to advise the states that compliance with RLUIPA is a condition attached to the receipt of federal funds; and (2) even if the language is clear enough to advise the states that they are receiving funds conditioned upon compliance with RLUIPA, what amounts to "compliance" is so vague and fact-specific that the states cannot reasonably comprehend what obligations they are accepting if they continue to receive federal funds to be used in prison operations. Neither of these arguments has merit.

Defendants' first argument relies heavily on the Pennhurst case. Pennhurst held that a specific section of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, *42 U.S.C. § § 6000* et seq., was not intended to be an enforceable condition on the states' receipt of federal funds under that Act. In so holding, the Court contrasted the language [**29] of the "Bill of Rights" portion of the Act, *42 U.S.C. § 6010*, with other sections of the same statute, and observed that "noticeably absent from § 6010 is any language suggesting that § 6010 is a 'condition' for the receipt of federal funding under the Act." *Pennhurst, 451 U.S. at 13.* The Court also examined the relevant legislative history and the overall structure of the Act, and reached the conclusion that although Congress intended other provisions of the Act to impose new legal duties upon states which accepted funding under the Act, § 6010 did not do so. *Id. at 21-27.* Defendants assert that this case is controlled by Pennhurst because the drafters of RLUIPA failed to use the word "condition" or an equivalent term, and that Pennhurst requires any expression of Congressional intent to be that precise. See also *Dole, 483 U.S. at 208* (noting that "the conditions upon which States receive the funds [under *23 U.S.C. § 158*, which explicitly directs the Secretary of Transportation to withhold funds from states in which persons under the age of 21 are permitted to purchase or [**30] possess alcoholic beverages] ... could not be more clearly stated by Congress").

A common-sense reading of RLUIPA as a whole is sufficient to refute defendants' argument. *42 U.S.C. § 2000cc-1*, the specific section of RLUIPA which applies to institutionalized persons, begins with these [*842] words: "No government shall impose a substantial burden on the religious exercise of a person ... confined in an institution ...." To argue that such language is a mere "congressional preference for certain kinds of treatment" as opposed to language which "creates rights and obligations," *Pennhurst, 451 U.S. at 18-19,* is to ignore the plain meaning of the phrase "no government shall ...." [HN9] "Shall" is quintessentially a word associated with obligations and rights. The creation of a private right of action in § 2000cc-2 to enforce this obligation ("[a] person may assert a violation ... as a claim ... in a judicial proceeding and obtain appropriate relief against a government") certainly suggests that Congress intended states receiving federal funds for prison programs or activities to be held accountable for breaching the obligation set forth in § 2000cc-1. [**31] Finally, § § 2000cc-3 (c) and (d) would be entirely unnecessary if the statute were simply intended to "nudge" the states in the direction of imposing lesser burdens on the free exercise of religion by institutionalized persons, *Pennhurst, 451 U.S. at 19,* quoting *Rosado v. Wyman, 397 U.S. 397, 413, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970).* Those subsections make it clear that the Act "may *require* a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise" and that the only activity affected by the Act is that of "a government *as a condition of receiving funding or other assistance* [for its programs or activities]" (emphasis supplied). The language of RLUIPA, fairly read, strongly evinces Congress' intent "to require the States to fund new, substantial rights," *Pennhurst, 451 U.S. at 18,* and therefore makes it clear to states which continue to apply for federal funding for prison programs that they will be subject to RLUIPA.

Furthermore, the language used in the Act closely parallels other federal statutes conditioning federal funding that have long been deemed to satisfy [**32] the notice requirement. See, e.g., *Davis v. Monroe County Bd. Of Educ., 526 U.S. 629, 649-650, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999)* (involving Title IX, *20 U.S.C. § 1681* (a), which states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"); *Guardians Ass'n v. Civil Service Com'n of City of New York, 463 U.S. 582, 598-599, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)* (involving Title VI, *42 U.S.C. § 2000d,* which states,

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"). Consequently, [HN10] the Court holds that RLUIPA adequately expresses Congress' intent to condition further payment of federal funds to state prison programs upon the states' compliance with RLUIPA.

Assuming that Congress did intend to make the states' [**33] continued receipt of funds for prison activities or programs conditional upon compliance with RLUIPA, defendants argue that the wording of the statute is too vague to allow them to make an informed choice as to whether or not to accept such funds. In the memorandum supporting the motion to dismiss, defendants, relying on dictum from Pennhurst, argue that the requirement that they use the "least restrictive means" to implement otherwise permissible restrictions on an inmate's exercise of religion "is so context-driven and subjective as to be no standard at all ...." Defendants' Memorandum, at 27. In their reply, defendants expand [*843] their argument, describing the Supreme Court's decision in *Suter v. Artist M., 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992)* and a large number of decisions from lower courts as a "significant body of precedent ... [striking] down similar spending statutes." Defendants' Reply, at 7.

Pennhurst, of course, did not strike down *42 U.S.C. § 6010* as an impermissibly vague exercise of the Spending Power. Rather, it held that § 6010 was not an exercise of the Spending Power at all. Similarly, the issue [**34] in Suter was whether certain language in the Adoption Assistance and Child Welfare Act of 1980, see U.S.C. § 671, provided for either a private right of action in favor of beneficiaries of the Act, or created rights assertable in an action under *42 U.S.C. § 1983,* to enforce the states' obligation to use "reasonable efforts" to keep biological families intact. In light of the fact that the only statutory obligation imposed on the states by § 671 was to submit a plan to the Secretary dealing with efforts to eliminate the need to remove children from their homes, the Court held that:

> Careful examination of the language relied upon by respondents, in the context of the entire Act, leads us to conclude that the "reasonable efforts" language does not unambiguously confer an enforceable right upon the Act's beneficiaries. The term "reasonable efforts" in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.

Id. at 362-363. The Court did not invalidate the Act as an impermissibly vague [**35] exercise of the Spending Power but specifically noted that the Secretary of Health and Human Services had the power to enforce the Act against the States, including the "reasonable efforts" requirement that the defendants in this case characterize as too vague to be enforceable. *Suter, 503 U.S. at 360-61.*

Defendants cite nine cases in addition to Suter which, according to their reply memorandum, support the proposition that similar language found in Spending Clause statutes has been held to be too vague to be judicially enforceable. Defendants neglect to state (and perhaps do not appreciate) that each of these cases, like Suter, did not consider the fundamental question of when a Spending Clause statute is so vague that a state cannot reasonably be required to comply with its mandates. In every case cited by defendants, the issues were (1) whether the statute at issue was enforceable by private individuals in a suit brought pursuant to § 1983, (2) whether a private right of action could be implied directly under the statute, or (3) both. The specificity of the obligations imposed upon the states by the statute in question is one of several factors pertinent [**36] to these questions, but in none of these cases did the court hold that the statute itself was an invalid exercise of Congress' Spending Power, and several, including Suter, made it perfectly clear that the statutes imposed valid obligations on the states, even if no private individual was entitled to sue for a violation of those obligations. Defendants' effort to obscure the difference between what is a valid exercise of the Spending Power and when, absent a specific Congressional intent to create a private cause of action, a private individual may sue to enforce that valid exercise of the Spending Power, is, at the least, unhelpful to the ultimate resolution of this issue.

Despite the fact that defendants did not cite a single case which invalidated any portion of a statute enacted pursuant to Congress' Spending Power on vagueness grounds, the Court will still address the [*844] issue presented. Obviously, the wording of RLUIPA parallels that of the "strict scrutiny" standard developed by the Supreme Court and used in a number of different Constitutional analyses, including religious accommodation cases. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hileah, 508 U.S. 520, 546, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993)* [**37] (religious accommodation); *Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 718, 67 L. Ed. 2d 624,*

101 S. Ct. 1425 (1983)("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *U.S. v. Playboy Entertainment Group, 529 U.S. 803, 813, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000)*(first amendment). This standard has been used in Constitutional jurisprudence for at least the last 100 years. Furthermore, this standard has been used to analyze many constitutional complaints of prisoners prior to the Supreme Court's decision in *Turner v. Safley, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*, see, e.g., *Procunier v. Martinez, 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800, 71 Ohio Op. 2d 139 (1974)*, and under RFRA prior to the Boerne decision.

[HN11] The Court concludes first, that this standard is not so vague that States cannot reasonably appreciate the obligations they are choosing to undertake by continuing to accept federal money for prison programs. It is true that state officials will be required to evaluate religious [**38] freedom claims somewhat differently than under Turner, and that to some extent they will be subject to judicial "second-guessing" as to whether they have chosen the "least restrictive means" of implementing compelling state interests. The fact that they cannot predict with 100% accuracy exactly how they will be required to respond to any specific inmate's request for an accommodation of his or her religious practices, however, does not mean that state officials are left completely in the dark as to what RLUIPA will generally require them to do. Indeed, defendants' own memoranda are replete with details of what compliance with RFRA entailed. RLUIPA puts the states on notice that a similar response will be required under its terms. If Ohio does not wish to return to the pre-Boerne RFRA days, it can simply refuse the money.

Moreover, in light of the case law cited above, it is far too late in the day to suggest that RLUIPA's "strict scrutiny" standard is too vague to be judicially enforceable (if, in fact, that is even a consideration when Congress expressly provides for a private right of action under the statute). Courts have been enforcing that exact standard against state [**39] action for years. States are required to tailor their actions to that standard in almost every First Amendment situation arising outside the prison setting. Consequently, defendants' vagueness argument is an insufficient basis for invalidating RLUIPA under the Spending Clause.

3. Relationship to Funding

Next, defendants argue that there is not a substantial enough connection between federal funding for prison activities or programs and the free exercise of religion by prisoners to support RLUIPA as a valid exercise of the Spending Power. Defendants argue that the conditions here bear no relationship to the funds being provided by the state, citing *Rust v. Sullivan, 500 U.S. 173, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991)*, and that the conditions are void as unacceptably disproportionate to the relatively small percentage of funds being provided to the state, citing *FCC v. League of Women Voters, 468 U.S. 364, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984)*. Specifically, defendants argue that although ODRC receives federal funds for various prison programs, "none of those funds have any relation to religion." Defendants' [*845] Memorandum, at 28. The Court [**40] finds these contentions unfounded.

South Dakota v. Dole involved a challenge to Congress' effort to encourage all states to raise the legal drinking age to 21. The statute at issue in that case, *23 U.S.C. § 158*, authorized the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable to any state where the minimum drinking age was under 21. As in this case, the state argued that Congress had exceeded its Spending Power by conditioning the receipt of federal funds designated for one purpose (i.e. the construction and maintenance of highways) on the states' compliance with Congress' wishes in an unrelated matter, namely the minimum drinking age. Although the Supreme Court acknowledged in Dole that prior cases had, "without significant elaboration," suggested this limitation, *id. 483 U.S. at 207*, it soundly rejected the states' challenge to § 158, holding that the drinking age issue was "directly related to one of the main purposes for which highway funds are expended - safe highway travel." *Id. at 208*.

Defendants have failed to cite a single decision, either from the Supreme Court or any other court, which struck [**41] down an exercise of the Spending Power because the purpose of the funds was not reasonably related to the encumbering condition imposed upon their receipt. Both *Rust v. Sullivan, supra,* and *League of Women Voters, supra,* were decided on other grounds, and Rust *upheld* the federal restrictions at issue, thus undercutting the force of defendants' assertion that plaintiffs have failed "to explain how RLUIPA's agency-wide mandate can be squared with the Court's decision [] in ... Rust ...." Reply brief, at 11. Plaintiffs cite to the Eighth Circuit's decision in *Jim C. v. United States, 235 F.3d 1079 (2000)* (en banc), cert. denied, *121 S. Ct. 2591 (2001)*, as a recent example of a holding supporting a broad interpretation of the "reasonably related" requirement, and that court did reject, at least implicitly, the dissenters' view that the condition attached to receipt of funds under the Rehabilitation Act (the states' waiver of their Eleventh Amendment immunity from suit under the Act) "bears no direct relationship ... to the purpose of most federal grants to the state for education." *Id. at 1083* [**42] (Bowman, J., dissenting).

The Court will assume (although the Dole Court expressly refused to decide the question) that a direct relationship between the programs receiving federal funds and the conditions attached to those funds is required. In this case, giving due deference to Congress' determination that such a relationship exists, the Court agrees with plaintiffs that there are a myriad of direct connections between the funds made available to state prisons and the restrictions imposed by RLUIPA. On the most basic level, the exercise of religion by prisoners, and the presumed rehabilitative benefits derived from that exercise, pervade the entire prison environment. Moreover, plaintiffs have identified specific programs within ODRC (see Plaintiffs' Joint Reply to Defendants' Motion to Dismiss, at 19) which both receive federal funding and deal specifically with inmate rehabilitation. This connection is at least as direct as that between funds allocated for highway construction and the minimum drinking age. [HN12] Given the discretion granted to Congress to determine, in the first instance, the need to enact specific legislation to further the general welfare, and the precept that [**43] courts may strike down otherwise properly-enacted federal legislation only if it clearly exceeds constitutional limits on the Article I power, the Court concludes that the relationship between federal funds received [*846] by ODRC and the religious practices of inmates confined in institutions under the jurisdiction of the ODRC is sufficiently direct to insulate RLUIPA from this particular constitutional challenge.

4. Whether RLUIPA violates the Establishment Clause

Finally, defendants maintain that RLUIPA violates the Establishment Clause as well as the Tenth Amendment to the United States Constitution. The Tenth Amendment issue will be addressed later in this Report and Recommendation. For the following reasons, [HN13] the Court concludes that RLUIPA does not violate the First Amendment's Establishment Clause.

[HN14] The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. Amend. I. Although some members of the Court have recently expressed their discontent with the three-part test contained in *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*, it remains [**44] the current standard by which to determine whether a statute violates the Establishment Clause. *Mitchell v. Helms, 530 U.S. 793, 147 L. Ed. 2d 660, 120 S. Ct. 2530 (2000); American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board, 243 F.3d 289 (6th Cir. 2001)*. To pass constitutional muster, the statute in question (1) must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) the statute must not foster an "excessive government entanglement" with religion. *Lemon, 403 U.S. at 612-13; Capitol Square Review, 243 F.3d at 306*. Defendants, citing to *Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 86 L. Ed. 2d 557, 105 S. Ct. 2914 (1985)* and *Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 103 L. Ed. 2d 1, 109 S. Ct. 890 (1989)*, contend that RLUIPA fails the second prong of this test because it constitutes an impermissible government endorsement of religion and would also impermissibly burden third parties such as prison staff or other inmates.

In the Court's view, defendants' Lemon argument is [**45] completely foreclosed by *Corporation of the Presiding Bishop of the Church of Jesus Crist of Latter-Day Saints v. Amos, 483 U.S. 327, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987)*. Amos also involved an Establishment Clause challenge to a federal statute - in that case, *42 U.S.C. § 2000e-1*, § 702 of Title VII of the Civil Rights Act of 1964 - which exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. The district court had concluded that the exemption had the primary effect of advancing religion, thus running afoul of the second prong of the Lemon test. In so concluding, the district court found it significant that only religious organizations obtained a benefit from the operation of the statutory exemption, and that it "burdened the free exercise rights of employees of religious organizations who work in nonreligious jobs." *Id. at 333*.

The Supreme Court unanimously reversed the district court, specifically rejecting its reasoning about the effects of § 702. In so doing, it held, first, that [HN15] governments may, in their effort to accommodate religion, [**46] go beyond what is minimally required of them by the Free Exercise Clause without running afoul of the Establishment Clause. *Id. at 334-35*. Second, it noted that government is permitted, under Lemon, "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions" so long as the government does not [*847] "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Id. at 335*. The Court rejected the notion that any law which makes it easier for a religion to carry out its mission is unconstitutional, noting that "religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster," such as laws which provide tax exemptions to religious organizations or which permit school supplies to be loaned to students attending parochial schools. *Id. at 336*. What is prohibited is the "*government* itself ... advancing religion through its own activities and influence." *Id. at 337*. Finally, the Court rejected the notion that a law which singles [**47] out religions for the benefit it confers is *per se* unconstitutional. If that were

so, any law designed to minimize the burdens otherwise placed on religion by governmental regulation would fail. As the Court concluded, "where ... government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities." *Id. at 338.*

Somewhat surprisingly, defendants' initial memorandum does not even cite to Amos, let along attempt to distinguish it. Defendants' Memorandum, at 42-44. In their reply memorandum, defendants offer two bases for distinguishing Amos from the facts of this case: (1) that the statutory exemption at issue in Amos "did not give the beneficiaries anything they did not already have before Congress initially legislated in the area," id. at 32, and (2) that the effect of § 702 was simply to "[withdraw] the sovereign from the dispute between the beneficiary and the third party [i.e. the affected employee]" as opposed to having the government "[weigh] in on behalf of religious beneficiaries in their disputes with third [**48] parties." Id. at 34. They continue to rely on Calder and Texas Monthly as countervailing authority, noting that they do not disagree with the fundamental principle, recognized in Amos, that the government may lawfully provide additional accommodations for religious practices not mandated by the Free Exercise Clause, but contending that these accommodations are not permissible if they impose burdens on third parties as a result. Id. at 29-30. The specific burdens that defendants point to are the lessening of protection for prison staff and other inmates that, in their view, will necessarily result from increased accommodation of prisoners' religious practices.

It is true that the statutory scheme involved in Amos first imposed a restriction on the ability of all private employees, including religious organizations, to discriminate on the basis of religion, and then exempted religious organizations from that restriction, thus restoring them to the same status they enjoyed prior to the enactment of Title VII. Laws providing for tax exemptions fall into the same category. However, the same cannot be said for the statute at issue in *Board of Education v. Allen, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968),* [**49] which conferred upon parochial school children the right to receive loaned textbooks free of charge, a right they did not enjoy prior to the passage of the statute, and certainly not one conferred upon them by the Constitution. Allen was cited by Amos with approval as an example of a law that both assisted a religious organization in carrying out its religious mission and which passed constitutional muster under the Lemon test. *Amos, 483 U.S. at 336-37.* In short, defendants have attempted to graft onto the Lemon test an additional requirement that government may not legislate to provide any accommodations to religion unless those accommodations are [*848] either constitutionally mandated by the Free Exercise Clause or take the form of exemptions from laws of general application that impose a burden on the free exercise of religion, even if that burden could be constitutionally imposed. Not surprisingly, there is no authority to support this additional requirement, and Amos cannot be properly distinguished from this case on that ground.

Texas Monthly and Caldor provide no support for defendants' position. Defendants cited Texas Monthly for [**50] the proposition that "an endorsement [of religion] occurs if government provides a benefit to religious adherents that is not necessary to avoid a Free Exercise violation and that benefits imposes burdens on third parties." Defendants' Memorandum, at 42. In fact, Texas Monthly dealt with the vastly different issue of government *subsidies* to religion, *Texas Monthly, 489 U.S. at 15* (Brennan, J.), and specifically rejected Texas' argument that its tax subsidy for religious publications was sustainable on grounds that it was reasonably necessary to accommodate the free exercise of religion. *Id. at 18 & n.8.* Justice Brennan, speaking for only three members of the Court, did indicate, in dictum, that even reasonable accommodations of free exercise such as the one approved by the Court in Amos might fail if they imposed monetary costs or other substantial burdens on third parties in the form of an increased tax burden. Id.; see also *Children's Healthcare is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000),* cert. denied, *121 S. Ct. 1483 (2001).* However, defendants have not cited a single [**51] case in which such a law has been held unconstitutional on that ground.

Caldor, which is cited by defendants as such a case (and also referred to as a "unanimous opinion," Defendants' Reply, at 30, even though Justice Rehnquist dissented), actually held that the statute at issue there, which allowed any employee to choose not to work on his or her designated Sabbath, violated the Establishment Clause because it had "the primary effect [of] impermissibly advancing a particular religious practice." *Caldor, 472 U.S. at 710.* Moreover, it did so without regard to the consequences to persons who did not benefit from the statute's protection. However, to the extent that Caldor considered the burden imposed upon third parties as a factor in determining whether the statute impermissibly advanced a particular religious practice, it is easily distinguished from this case.

In Caldor, the right granted to persons whose religion included a Sabbath (and, of course, that is not a universal religious observance) was made absolute, and no countervailing interests of employees or co-workers were permitted to outweigh it. If RLUIPA commanded the states to accommodate any [**52] *bona fide* religious

practice of institutionalized persons without regard to considerations of prison security, it would suffer from a similar defect. However, [HN16] RLUIPA specifically permits safety and security - which are undisputedly compelling state interests - to outweigh an inmate's claim to a religious accommodation so long as there is a sufficient nexus between that interest and the denial of the requested accommodation, and there is no reasonable alternative to denial that would accommodate both the free exercise of religion and the need to maintain order in the prison environment. Although defendants, citing to their experience under RFRA, contend that it is factually impossible to provide the kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates, the Court does not believe it is appropriate to make such a factual finding on this record. Further, it seems unlikely that one court [*849] could strike down an entire statute on constitutional grounds simply because one state claims to have had difficulty meeting the requirements of a similar statute in the past. [HN17] At a minimum, Caldor would [**53] seem to suggest that the constitutional infirmity of a statute like RLUIPA would flow from consequences that are evident or on the face of the statute and which, due to the absolute nature of the statute's requirements, cannot be avoided by any amount of statutory interpretation. Where, as here, it is an open question as to the extent of the burdens (if any) RLUIPA will necessarily place on third parties such as other inmates or taxpayers, and where the courts will be given the chance to interpret RLUIPA's requirements in order to avoid placing unconstitutional burdens on others in order to accommodate the free exercise of religion, the statute will withstand the kind of challenge that defendants raise. Additionally, it is worth noting that although no other federal court has decided whether RLUIPA violates the Establishment Clause, every circuit court considering a similar challenge under the comparable provisions of RFRA found that it did not and does not violate the Establishment Clause. See *Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir.1997); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir.1995); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir.1996);* [**54] *EEOC v. Catholic Univ., 317 U.S. App. D.C. 343, 83 F.3d 455, 470 (D.C.Cir. 1996).*

Finally, Defendants argue that RLUIPA violates an overarching principle of Spending Clause constitutional jurisprudence, namely that the pressure exerted on the states to accept the conditions placed on the grants rises to the level of coercion. See, e.g., *Dole, 483 U.S. at 211; Steward Machine Co. v. Davis, 301 U.S. 548, 590.* Although the case law discussing this aspect of the Spending Clause provides little guidance, the Court notes that the federal funds at issue in this case, even if withheld in their entirety, constitute less than 1% of the entire budget of the ODRC. See Defendants' Memorandum at 20. While the Court has no doubt that these funds would be missed, the fact remains that [HN18] the potential loss of this relatively small amount of the funding by the States does not cross the generalized line established by the prior cases and turn enticement into compulsion. See generally, *Dole, 483 U.S. at 211* (loss of 5% of federal highway funds not coercive); *Steward Machine Co. v. Davis, 301 U.S. at 590.* Here, as in Dole, [**55] "Congress has offered relatively mild encouragement to the States" to achieve a desired objective. *Dole, 483 U.S. at 211.* The guiding principle established by the Supreme Court in Steward Machine Co. almost sixty years ago still holds true today:

> Every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.

Id., 301 U.S. at 589-590. This Court will not conclude, on the facts before it, that the Defendants would be forced to surrender their position as co-equal sovereigns in the federal system as a result of the conditions expressed in RLUIPA. See *New York, 505 U.S. at 167, 188.* Accordingly, after considering all of defendants' contentions, the Court finds RLUIPA to be a proper exercise of Congressional power pursuant [**56] to the Spending Clause.

[*850] IV.

Defendants maintain that regardless of whether RLIUPA is deemed to be a constitutional exercise of Congress' power, the Tenth Amendment and the Eleventh Amendment provide the state with immunity. These issues do not require extended discussion.

A. Tenth Amendment Immunity

The Tenth Amendment to the United States Constitution provides that [HN19] "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [HN20] This provision has long been interpreted by the Court to ensure that the federal government remains one of "limited powers," *Gregory v. Ashcroft,*

501 U.S. 452, 457, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991), determining "what powers in fact have been given [to it] by the people." *United States v. Butler, 297 U.S. 1, 63, 80 L. Ed. 477, 56 S. Ct. 312 (1936)*.

First, the Court has already held that RLUIPA is a constitutional exercise of the Spending Power. The Supreme Court conclusively held in Dole that [HN21] the Tenth Amendment stands as no independent constitutional bar to such legislation. *Id., 483 U.S. at 210-11.* [**57] Accordingly, Defendants' Tenth Amendment argument necessarily fails. Defendants seek, however, to extend the reach of a number of relatively recent Supreme Court decisions, including *Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999), United States v. Printz, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997), New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)*, and *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)*, to establish a new type of Tenth Amendment immunity constituting a "structural immunity from suit that extends beyond the Eleventh Amendment." Defendants' Memorandum, at 52. Defendants' are correct that [HN22] the scope of the state's sovereign immunity "neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden, 527 U.S. at 713.* However, Alden simply held that the Constitution did not give Congress the power to waive a state's sovereign immunity from suit in its own courts. In Alden, the legislature at issue was not passed pursuant to any Congressional [**58] power to affect the states' sovereign immunity under the Eleventh Amendment or otherwise. Alden did not affect the Court's holdings in other cases that [HN23] the determination of whether a particular statute violates the Tenth Amendment is necessarily a determination of whether Congress was within its enumerated powers in passing the contested legislation:

> Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers Engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York, 505 U.S. at 156-157. [**59] [HN24] Because Congress acted constitutionally under the Spending Clause in passing RLUIPA, Ohio's Tenth Amendment [*851] rights necessarily have not been violated.

B. Eleventh Amendment Immunity

[HN25] The Eleventh Amendment provides that "the Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. Amend. XI. [HN26] Although the text of the Amendment creates no immunity against citizens attempting to sue their own state, it has long been settled that the Amendment, representing the concept of states as co-equal sovereigns with the federal system bars such suits. *Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996)* ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting states was not contemplated by the Constitution when contemplating the judicial power of the United States.")(internal citations and quotation marks omitted); see also *Hans v. Louisiana, 134 U.S. 1, 15, 33 L. Ed. 842, 10 S. Ct. 504 (1890).* [**60] Furthermore, suits which raise civil claims against state officials for actions committed while serving in their official capacity but are, in essence, a claim against the state are barred by the Eleventh Amendment. See *Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 462-464, 89 L. Ed. 389, 65 S. Ct. 347 (1945)*(holding that when action is essentially one for recovery of money from the state, even though individual officers are nominal defendants, the state is the real, substantial party in interest and entitled to sovereign immunity under the Eleventh Amendment).

[HN27] Although Congress has the power to abrogate a state's Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment, see *Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976)*, in Seminole Tribe, the Court expressly overruled contrary precedent (*Pennsylvania v. Union Gas Co., 491 U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989))* and firmly established that Congress may not abrogate state sovereign immunity under any of its Article I powers. See *Seminole, 517 U.S. at 72-73;* see also [**61] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 636, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999).* Defendants

claim that because Congress purported to pass RLUIPA pursuant to its Commerce Clause powers and because neither the State of Ohio nor the ODRC waived its Eleventh Amendment immunity, Defendants are immune from suit under RLUIPA. Here, the Court has held that RLUIPA was validly enacted pursuant to Congress' Spending Clause powers. In accepting the terms of the federal grants, Defendants necessarily accepted all of the conditions Congress established for funds eligibility. While the Court in Florida Prepaid may have found the doctrine of constructive waiver inapplicable in the Commerce Clause context, they did not find the Spending Clause powers so limited:

> We have held in such cases as South Dakota v. Dole that [HN28] Congress may, in the exercise of its spending power, condition the grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. *These cases seem to us fundamentally different from* [**62] *the present one.*

Id., 527 U.S. at 636 (emphasis added)(internal citations omitted). As a result, [HN29] the state's acceptance of the terms pursuant to the Spending Clause necessarily establishes its acquiescence to § 2(a) of the Act, providing that "[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding [*852] and obtain appropriate relief against a government," where the term "government" includes a state, its departments, or its officials. *42 U.S.C. § 2000cc-5*(4)(A).

Even had the defendants not consented to suit under the Act, [HN30] the doctrine of *Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)* remains good law in providing that plaintiffs, as here, may bring a suit against a state official seeking prospective injunctive or declaratory relief to conform their behavior to comply with federal law without running afoul of the Eleventh Amendment. See Idaho v. Coeur d' *Alene Tribe, 521 U.S. 261 (1997).* Despite Defendants' insistence to the contrary, RLUIPA is valid federal law, and Ex parte Young serves to insure that Plaintiffs can maintain an action against [**63] defendants to enforce compliance with the statute.

Defendants also contend that this is a case like Coeur d'Alene, so that a suit under RLUIPA which proceeds on an Ex Parte Young theory would violate the Eleventh Amendment. In Coeur d'Alene, an Indian tribe filed suit in federal court seeking to validate its claim of ownership to lands submerged under Lake Coeur d'Alene and certain surrounding rivers and streams. The Court held that the suit was the functional equivalent of an action to quiet title, which the Eleventh Amendment clearly prohibited, and that the state's interest in possession and control over property lying within its boundaries was sufficiently strong to justify recognition of a unique sovereign interest inconsistent with the application of the Ex Parte Young exception. See Coeur d' *Alene, 521 U.S. at 286-288; Ford Motor Company v. Department of Treasury of Ind., 323 U.S. 459, 464, 89 L. Ed. 389, 65 S. Ct. 347 (1945).*

Defendants claim that the same principle should apply to suits brought under RLUIPA because the relief available to prisoners - changing the way the state administers the religious exercise portion of [**64] its prison programs - is "the functional equivalent of relief that could not be obtained directly against the state under the Eleventh Amendment," Defendants' Memorandum, at 50, or because RLUIPA is a statute of "dubious constitutionality" and therefore represents a unique intrusion into the traditional state function of running a prison. Defendants' Reply, at 38. The Court has rejected the latter contention, and in any event is unaware of any decisions suggesting that the application of Ex Parte Young depends upon whether the underlying federal statutory right to be enforced is one whose constitutionality may fairly be subject to debate. As to the former contention, [HN31] the Eleventh Amendment clearly does not now prohibit prisoners from utilizing Ex Parte Young to obtain accommodations for their religious practices. The only difference is that the courts have judged the states' policies under the more deferential Turner standard. However, a decision favoring a prisoner in such a case still may require a prison to "rewrite" its policies, the very relief which defendants contend is unavailable under the Eleventh Amendment. Additionally, this is not a case like *ANR Pipeline v. LaFaver, 150 F.3d 1178 (10th Cir. 1998),* [**65] where Congress itself had, through the Tax Injunction Act, expressly recognized the states' sovereign interest in assessing and collecting taxes without significant federal interference. RLUIPA is an obvious Congressional determination that the states do not have an interest in regulating the religious exercise of institutional persons that cuts to the very core of state sovereignty, and this Court is not persuaded that it should so hold.

V.

Based on the foregoing, it is recommended that the Court find RLUIPA, *42 U.S.C. § § 2000cc* et seq., to be a constitutional [*853] exercise of Congress' Spending Power. Furthermore, it is recommended that the Court find that neither the Tenth nor Eleventh Amendments provide the defendants with immunity from RLUIPA's provisions. Consequently, it is recommended that defen-

dants' motion to dismiss, with the exception of that portion directed to plaintiffs' claims under the Ohio Constitution, be denied.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within ten (10) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings [**66] or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. *28 U.S.C. § 636*(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. See *Thomas v. Arn, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985); United States v. Walters, 638 F.2d 947 (6th Cir. 1981).*

Terence P. Kemp

United States Magistrate Judge

8/27/01